Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MEDIA GENERAL, INC.

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

APPENDIX VOLUME III

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b. Choice of Media

401. We have determined which media to include in the Diversity Index based on the survey information derived from the "Consumer Survey on Media Usage" prepared by Nielsen Media Research (FCC MOWG Study No. 8). This survey tells us how consumers perceive the various media as sources of news and information. The key threshold implication of this study is that consumers use multiple media as sources of news and current affairs, and hence that different media can be substitutes in providing viewpoint diversity. For example, consider a citizen who acquires local news from television, newspapers, and radio. Suppose that a group of citizens in the consumer's home town wishes to oppose a bond issue for a new sports stadium, and that the local newspaper and television stations favor the bond issue and choose not to cover the position of opponents. If the opponents nevertheless get radio coverage for their position, they would be able to reach this particular citizen. Indeed, one might think that part of the radio coverage might address the fact that other media are "ignoring" the story. This could then raise the profile of the story to a level that might attract newspaper or television coverage. We put forward this hypothetical sequence of events not because we think that it describes a process that will happen with respect to any particular controversy. Rather it is a useful illustration of the process by which markets with multiple independent media outlet owners operate, particularly in an environment in which citizens generally do not depend on a single medium for their local news and current affairs.

402. FCC MOWG Study No. 8 asked respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs." The same question was posed for national news and current affairs. The choices offered were television, newspaper, radio, Internet, magazines, friends/family, other, none, don't know, and refuse. The survey then asked follow-up questions regarding the first five choices. For each one of the five sources, respondents who did not mention a source were

asked specifically if they used that source for local news and current affairs. The survey posed analogous questions with regard to national news and current affairs. Based on the initial and follow-up questions, the survey presents "summary data" on sources of local and of national news and current affairs information.

403. In an *ex parte* communication filed May 28, 2003, Media General submitted a critique of MOWG Study No. 8 by Prof. Jerry A. Hausman. Hausman argues that the Nielsen Survey has a number of serious flaws and questions its usefulness in any rule-making concerning cross-ownership of newspapers and broadcast stations.[903] First, he claims that the low response rate of the survey may lead to biased results.[904] Second, he argues that survey questions about hypothetical future circumstances are unreliable. He cites a number of cases where respondents, presented with relatively simple questions, are unlikely to consider the full, complete implications if a particular form of media were to become unavailable.[905] Third, he argues that the survey asks no questions that address the newspaper/broadcast cross-ownership issues.[906]

404. We recognize Professor Hausman's concerns, but we believe that the Nielsen survey sample of 3,136 households provides us with useful information. In addition, Professor

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[903] Statement by Jerry Hausman, Media General Notification of Ex Parte Communication (May 28, 2003)

[904] *See* Hausman at 3.

[905] For example, he cites where the Nielsen survey asks whether respondents would be more likely to use cable or satellite news channels for news if broadcast TV channels were not available. He notes that the question does not ask the respondent to consider a number of important factors, such as whether VHF and UHF news programs would cease to exist or whether only cable and satellite news programs would remain. Since it is not clear what hypothetical world the respondents are assuming. Hausman argues, the results of the survey are not reliable. Hausman, at 4-5.

[906] Hausman at 6.

Hausman provides no evidence that the sample is, in fact, biased. Concerning Hausman's second point, we agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. Regarding Hausman's third point, although the Nielsen survey may not directly ask respondents for their views concerning specific cross-ownership scenarios, we find that the results of the survey are useful in a number of areas, such as which forms of media are most heavily used for news. While questions could have been posed that contained more specificity concerning cross-ownership rules, we understand that such complexities could have made the survey design more difficult, as well as possibly lowered the response rate. Overall, while Hausman claims that the Nielsen survey does not "provide a basis for the measurements necessary for the specification of policy,"[907] the survey does, in fact, help us establish an "exchange rate" for converting newspaper, television, radio, and other media into common units so we can measure the extent of concentration in the "market of ideas." Finally, we emphasize that the Commission has not relied solely on the results of the Nielsen survey, but has used a number of studies and its own expert judgment on media in reaching its decision.

405. The data in the Nielsen study indicate that television, newspapers, radio, Internet, and magazines are the leading sources of news and current affairs programming.[908] Indeed, the summary data tables list only those five sources. In the initial questions, less than one percent of respondents cite "other" as a source. Based on the initial question, the average respondent uses two of the five major sources for news and current affairs,

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[907] Hausman at 3.

[908] MOWG Study No. 8 at Tables 97 and 98.

whether the category is local or national. Taking account of the follow-up questions, the average respondent uses three of the five major sources for news and current affairs, again regardless of whether the category is national or local.[909] These data strongly suggest that citizens do use multiple media as sources of viewpoint diversity, and that media can be viable substitutes for one another for the dissemination of news, information and viewpoint expression. On the basis of this finding, we proceed to an analysis of local media markets and whether there are particular kinds of cross-media transactions in particular kinds of markets that would likely result in high levels of concentration. To assist in making that determination, we rely in part on our Diversity Index.

406. Our Diversity Index focuses on availability of sources of local news and current affairs. As we explained in our policy goals section above, we are concerned with promoting viewpoint diversity in local media markets. Owners of media outlets clearly have the ability to affect public discourse. Consumers have numerous sources of national news and information available to them. Three major commercial broadcast networks, ABC, NBC, and CBS, provide this material and are available to 98% of US television households.[910] Several nonbroadcast networks also provide national news and current affairs information also are widely available. Subscribership to CNN is 77.4% of US television households.[911] The comparable figures for Headline News, Fox News, MSNBC, and CNBC are 74.1%, 71.8%, 68.4%, and

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[909] The average respondent uses 2.93 different media for local and 2.71 different media for national news and current affairs.

[910] *See* OPP Working Paper 37 at 48. In January 2002, there were 105.5 million television households in the U.S. *See* Television Advertising Bureau, *Trends in Television* at *www.tvb.org*.

[911] *See* Kagan World Media, *Cable Television Investor* (July 29, 2002) at 14.

74.9%, respectively.[912] Local newspapers generally provide information on national issues, and a variety of major newspapers have national footprints. They include USA Today, the Wall Street Journal, the New York Times, and others. Moreover, a wide range of newspapers are available on-line at no charge. National news magazines, such as Time, Newsweek, US News and World Report, and more specialized political journals, such as Weekly Standard and New Republic are also widely available.[913] Therefore we do not believe that governmental regulation is needed to preserve access to multiple sources of national news and public affairs information.

407. The Diversity Index incorporates information on respondents' usage of television, newspapers, radio, and the Internet. Respondents also reported getting local news and information from magazines.[914] We exclude magazines, however, from our Diversity Index. First, as the description above makes clear, most (but not all) news magazines have a national rather than a local focus. Although there are exceptions (e.g., the Washingtonian and Texas Monthly), the figures in MOWG Study No. 8 on magazines use appear to be overstated. This simplification and assumption is supported by other aspects of the study. For example, unlike newspapers, radio, and television, almost no one cited magazines as their primary source of news and current affairs. MOWG Study No. 8 includes a question asking respondents to identify their single primary source of local or national news and current affairs.

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[912] *Id.* The total television households figure (105.5 million) is for January 2002 and is from Television Advertising Bureau, *Trends in Television* at www.tvb.org.

[913] *See* Appendix B for a summary list of major national news sources. We note that some of the sources for national news and information are owned by the same companies but we continue to believe that consumers have numerous independently owned sources of national news and information.

[914] Six percent of respondents answered that they received their local news and information from magazines.

The figure for magazines is 0.6%.[915] A 2000 study by the Pew Research Center for the People and the Press provides similar results.[916] The study examines "Trends in Regular News Consumption" and finds that 12% of respondents, but only 4.2% of responses cite news magazines. An even lower share, 5% of respondents and 1.7% of responses, cite business magazines. Moreover, these figures include consumption of national as well as local news. The share of the sample utilizing magazines for local news is smaller, perhaps considerably so. The Pew Center data support our inference that magazines play a negligible role overall as a source of local news. We must also note that, although the actual local news figure is small, because both the MOWG Study No. 8 and Pew Center figures combine local and national news, the precise magnitude of the local news figure is uncertain. Hence we are unable to assign to magazines a weight (even a small weight) in which we would have confidence. Nonetheless, the decision to exclude magazines will be re-examined in the next biennial review, and we will take the opportunity to gather additional survey data at that time on magazine usage.

408. For similar reasons, we also exclude cable from our Diversity Index. As discussed in the following section, we are concerned that some consumers may have confused broadcast and cable television. Thus, we believe some consumers who replied that they receive their local news from cable may have been viewing broadcast channels over the cable platform. We also recognize, however, that cable systems do provide local news and current affairs information through PEG channels and, in some markets, local news channels. However, we do not have accurate data for this measure. Because we do not

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[915] MOWG Study No. 8, Table 20.

[916] Pew Research Center for the People and the Press, *Internet Sapping Broadcast News Audience*, http://people-press.org/reports/display.php3?PageID=203.

have reliable data on this point, we exclude cable from the DI to simplify our general analysis.[917]

c. Weighting Different Media

409. We have concluded that various media are substitutes in providing viewpoint diversity, but we have no reason to believe that all media are of equal importance. Indeed the responses to the survey make it clear that some media are more important than others, suggesting a need to assign relative weights to the various media. In view of our focus on local news and current affairs, we choose to base our weights on survey responses to the question asking respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs."[918] We recognize that this is not a perfect measure, and that it requires some adjustment. We justify these adjustments and assumptions, however, by emphasizing that we are using the DI only to inform us of general market trends, not for precise measurements.

410. As noted above, the average respondent uses three different media for local news and current affairs information. It is likely that, for a given respondent, the three are not all of equal importance. If media differ in importance systematically across respondents (*e.g.*, if television were most important to everyone, and everyone made only minor use of radio to acquire news and current affairs information), then it would be misleading to weight all responses equally.

411. Unfortunately, we do not have data on this question specifically with regard to local news and current affairs. The available "primary source" data address local and national news together and do show that different media have different importance, in the sense that primary usage differs across

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[917] As with magazines, we will review this issue in the next biennial review, and may collect at that time more accurate survey data on consumers' use of cable for local news and current affairs.

[918] MOWG Study No. 8, Table 97.

media.[919] Because "primary source" data are not available for local news and current affairs alone, we use the data identifying sources of local news and public affairs programming to weight the various media to reflect relative usage. As noted below, this leads to lower shares for television and higher shares for radio than the "primary source" shares reflect.

412. The local response summary data, Table 97 of MOWG Study No. 8, include five categories of media—Internet, magazines, radio, newspaper, television. Magazines account for 6.8% of responses to the questions on source of local news and current affairs. We exclude magazines as explained above and normalize the shares of the four remaining media to sum to 100%. The resulting weights are television (33.8%), newspapers (28.8%), radio (24.9%), and Internet (12.5%).[920] The local response summary data do not break down the television responses between broadcast television and cable/satellite television. Nor do these data separate out usage of daily and weekly newspapers. We make use of other FCC MOWG Study No. 8 questions to apportion the newspaper shares further.

413. Although the responses to one question in MOWG Study No. 8 suggests that cable is a significant source of local news and current affairs, other data from the study casts some doubt on this result. The following discussion explains the reasoning that leads us to exclude cable/satellite television from the current analysis of local news and current affairs for diversity purposes. As a threshold matter, DBS currently provides little or no local nonbroadcast content. We do, however, recognize that cable provides some such content and that it is becoming a more important source of local news and information. Some markets do have commercial local news

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[919] *Id.*, Table 20.

[920] The "primary use" weights, excluding magazines, are television (57.8%), newspapers (25.8%), radio (10.3%), and Internet (6.1%). When magazines are included their weight is 0.6%. *Id.*

channels on cable.[921] Moreover, at least one national cable news service (CNN Headline News) provides a five-minute local "cut-in" every half hour in some markets. Additionally, local public, educational, and governmental ("PEG") channels provide some local news and information, although the extent of their impact is unclear. MOWG Study No. 8 asked respondents who get local news and current affairs from television (table 8) to indicate if the source is "broadcast television channels," cable or satellite news channels," "some other channel," "don't know," or "refuse." Virtually all responses fell into the first two categories, with 46.4% of respondents who get local news from television identifying cable as their source.[922]

414. Our experience suggests that the local cable news response is too high. A review of the responses reported in tables 6, 16, and 18 of MOWG Study No. 8 support this assumption. Table 18 provides responses from all who get news (local or national) from cable to the question "what are the names of the news channels you watched in the past 7 days on cable or satellite for local or national news or current affairs?" The list from which respondents can choose includes CNN, Fox News Channel, MSNBC, Local Cable News Channels, Headline News, CNBC, Other, Don't Know, and Refuse. The last two choices get minimal response, but 27.5% of responses are "Other." This suggests that some people may be counting retransmitted broadcast signals on cable or satellite as cable or satellite channels.[923] Moreover, joint examination

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[921] Roughly one-third of cable subscribers, 22.3 million, had access to a local or regional news channel in July 2002. *See* OPP Working Paper 37 at 126.

[922] The corresponding figure for national news (from table 16) is 51.1 percent.

[923] Because all cable systems carry local broadcast stations pursuant to our signal carriage rules, and because DBS carriers provide local broadcast signals in many markets, also pursuant to our signal carriage rules, it is

of the responses reported in tables 6, 16, and 18 make it possible to infer that 94.3% of those who get news from cable (the table 18 universe) claim to get at least some local news from cable. However, only 6.1% of responses mention local cable news channels.[924] This disparity makes us question the responses regarding local news via cable and satellite channels and supports our conclusion that weighting cable 46.4% is too high. An additional reason that leads us to question cable as a local news source is that, of those local cable channels that meet Nielsen's minimum reporting standards, they are the least watched of any broadcast or cable stations in the market.[925] Given the low viewing of PEG channels and the facts that only one-third of cable subscribers have access to a local cable news channel and we do not have an accurate cable figure to use, we believe excluding cable from the Diversity Index on a national basis is a reasonable assumption. We will review the status of cable as a local news provider in the 2004 biennial review. Our review will include a follow-up to MOWG Study No. 8, which will include more detailed questions regarding the use of nonbroadcast video media for local news and current affairs.

415. With regard to newspapers, MOWG Study No. 8 indicates that 61.5% of those who cite newspapers as a source of local news and current affairs acquire that information from

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possible, even likely, that the "other" category actually reflects viewing of retransmitted broadcast signals. If we assume that viewers are likely to be familiar with local broadcast signals, it is not likely that the "don't know" category includes broadcast signal viewing.

[924] Local cable news channels are, unlike the Internet, not available everywhere, but only in select markets. Only approximately one-third of cable subscribers have access to such channels. *See* OPP Working Paper 37 at 126. The ownership limits apply nationwide, and the diversity index is intended to help us define these ownership limits. This was an additional reason for excluding cable from the DI while counting the Internet.

[925] Nielsen Television Index (Nov. 2000).

dailies only, 10.2% from local weeklies only, and 27.3% from both.[926] This works out to a share of 70.3% daily and 29.7% weeklies. We use these weights to divide the total newspaper share (28.8%) among daily and weekly newspapers. Our next biennial review will provide an opportunity for re-examination of the role of weekly newspapers. Accounting for the additional information on newspapers results in a revised set of weights. They are: broadcast television 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, and Internet 12.5%.

416. Various commenters agree that MOWG Study No. 8 supports the conclusion that citizens do, in fact, see different media as alternative sources of news. For example, NAA opines that the study, "a comprehensive survey…shows that the public makes ample use of a broad assortment of outlets" and that it "demonstrates that the public relies heavily on a range of alternative media."[927] Fox opines that the study "demonstrates that consumers are utilizing the wide variety of media available to them to obtain both local and national news and information." Later, this commenter states that this study, along with another study discussed in the comments "demonstrates that consumers are adept both at using various sources to obtain information and at using multiple sources simultaneously."[928] Critics of MOWG Study No. 8 include AFL-CIO and AFTRA, both of whom rely on a paper by Baker, attached to the AFL-CIO comments.[929] The Baker submission refers to the fact that MOWG Study No. 8 reports responses to a number of hypothetical questions regarding how respondents would behave if the availability to them of certain media were to change. Baker observes that the study "looks at what people

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[926] MOWG Study No. 8, Table 7.

[927] NAA Comments at 8.

[928] Fox Comments at 11, 25.

[929] *See* AFL-CIO Comments at 12 and Baker Study at 12-14 ; AFTRA Comments at 8.

say they will do" and goes on to assert that "[E]conomists usually prefer looking at what people do."[930] We agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. It is worth noting in this connection that much of the information we have on radio listening and television viewing is also based on reports by listeners and viewers of their behavior. Moreover, the information in MOWG Study No. 8 on the range of media that citizens use for news and information is quite similar to the results of a recent independent survey by the Pew Research Center.[931]

417. The most detailed analysis of MOWG Study No. 8 comes from the Consumer Federation of America.[932] CFA agrees that citizens get viewpoint diversity from multiple media. Their comments refer to the "two dominant political media—daily newspapers and television," although CFA asserts that these media "appear to play very different roles." As noted above, television has the largest weight in the DI (33.8%) and daily newspapers also loom large at 20.2%. Although the radio weight is somewhat higher at 24.9%, the fact that markets generally have far more radio stations than daily newspapers make our weights consistent with CFA's conclusion that newspapers are among the two most influential media. CFA finds that the Internet plays a small but growing role in citizen acquisition of news and information, a finding not inconsistent with the relatively low weight of Internet in our

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[930] Baker Study at 14.

[931] Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers*, (Apr. 27, 2003) at http://people-press.org/reports/display.php3?PageID=243.

[932] *See generally* CFA Comments at 94-147.

DI. CFA quotes statistics on daily use of television, newspapers, radio, and Internet that yield usage shares not too different from our DI weights. Drawing on two surveys, CFA suggests that people spend 4 minutes per day on average gathering news from the Internet, 25 minutes reading newspapers, 15 minutes listening to radio news, and "over half an hour" watching television news.[933] Ascribing half an hour to television leads to shares of 40.5% for television, 33.8% for newspapers, 20.3% for radio, and 5.4% for Internet. These are fairly close to our DI weights of 33.8%, 28.8%, 24.9%, and 12.5% for television, newspapers, radio, and Internet, respectively.

418. Although CFA does not dispute the proposition that different media address the same issues and stories, it asserts that they do so in different ways, suggesting, *inter alia*, that television is "the primary source for breaking news," that newspapers have a larger role in "the follow-up function," and that talk shows are a new and significant element of radio's role in disseminating viewpoints.[934] Although CFA does not discuss the role of radio as a source of breaking news, we acknowledge that different media do present information in different ways. CFA also argues that, particularly for "high use respondents" (the one-third of respondents in MOWG Study No. 8 whose total media use was above the sample average) there is evidence that the media are complements rather than substitutes, *i.e.*, people who use more of one medium tend to use more of the others. For the "low use respondents" (the one-half of respondents whose total media use was below the sample median), in many cases there are negative correlations in usage across many pairs of media. CFA suggests that this is consistent with substitution.[935] Thus, CFA appears to conclude

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[933] *Id.* at 109.

[934] *Id.* at 112, 100.

[935] *Id.* at 142-145.

that media are substitutes for some citizens and complements for others.

419. We disagree with CFA's conclusion that the DI is invalid because some citizens may consider certain media outlets complements rather than substitutes. In the technical economic sense, two goods are substitutes if an increase in the price of good A (which leads to a decrease in consumption of good A) leads to an increase in the consumption of good B. In the context of our diversity goal, we are concerned with the question of what happens when one or more media outlets refuses to transmit a particular viewpoint. If most citizens accessed only one type of outlet, *e.g.*, radio but not newspapers or television, then our diversity goal would prompt us to analyze separately the structure of the "radio marketplace of ideas." If, on the other hand, most citizens access multiple media, then we can rely on the reasonable probability that, if, *e.g.*, the local newspaper refused to cover a particular story, citizens would be exposed to that story via independently-owned other media, such as radio or television. In other words, evidence that media are complements in the sense that, for at least some citizens, there is a positive correlation between use of one medium and use of another, does not invalidate the premise underlying the DI.

d. Weighting Outlets Within the Same Medium

420. Having decided on relative weights for the various media, we next confront whether and how to weight different media outlets within each category. The decision of whether to do weighting turns on whether our focus is on the availability of outlets as a measure of potential voices or whether it is on usage (*i.e.*, which outlets are currently being used by consumers for news and information). We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach

reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public.

421. The underlying assumption here is that all outlets have at least similar technical coverage characteristics. This is a good, but not perfectly accurate assumption. Our signal carriage rules more or less equalize the coverage of all television stations in a particular DMA,[936] and it appears that newspapers (even those with limited current circulation) can expand their circulation area at relatively low cost. That is, assuming that additional readers are interested in the content, additional delivery personnel and vending machines are readily available at low cost. However, the assumption is less certain for radio. For example, a Class C FM station and a daytime AM station, in fact, have different coverage characteristics. The Class A station cannot expand its coverage to match that of the Class C FM station and thus reach additional listeners who might otherwise not have access to the views expressed on this outlet. Nevertheless, we believe the assumption to be reasonable across all cases. Arbitron radio metros are smaller than many radio station service areas and so would have the effect of truncating the service areas of more powerful stations. In addition, even though radio's total diversity share is 24.9%, on average there are enough radio stations so that the per-station share is fairly small. Any distortion in share by overestimating the reach of small radio stations is therefore small.

422. Even though we choose to assign the same weight to each outlet of a particular medium, we reiterate the importance of assigning different weights to different media. As noted above in ¶ 409 *et seq.*, different media are of different

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[936] We make this assumption for the purposes of constructing the DI; the actual differences in coverage are accounted for in the rules themselves, e.g., the UHF discount in the national rule, and our waiver policy in the local TV and CML rules will look to the actual reach of stations.

importance. The differences in usage across media documented in MOWG Study No. 8 are in part reflections of the differential impact on the user of television, radio, newspapers, etc. We believe that the overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences. A radio station owner is able to change format, say from classic rock to all-news, and thus change its impact on the marketplace of ideas. But a radio station switching to all-news does not thereby turn itself into the equivalent of a television station nor does its impact on the marketplace of ideas become that of a television station. Conversely, if a home shopping television station began to carry substantial local news programming, the impact on the marketplace of ideas would be greater than that of the former classic rock radio station.

423. The case for a usage measure is that it reflects actual behavior. However, current behavior is not necessarily an accurate predictor of future behavior. Moreover, in order to implement a usage measure accurately, it would be necessary for us to define which content should be considered local news and current affairs. Current behavior, *e.g.*, viewing or listening to a broadcast station, is based on the content provided by the station in question. However, media outlets can change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the "viewpoint diversity" marketplace. Such changes are unpredictable, so current market shares (e.g., of viewing or listening) may not be good predictors of future behavior. Indeed, advocates of a concentration approach to diversity analysis have noted the weakness of the usage approach, pointing out that "[E]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.' Only in examining 'its structure, history and probably future, does one provide' the appropriate setting for judging the

probably anticompetitive effect of the merger'"[937] This point has particular force when dealing with competition in the marketplace of ideas because media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost. Of course, availability of media can also change. However, this is less likely to occur than is change in the program schedule or station format. Moreover, availability is far more likely to increase than decrease. Although a broadcast station owner could turn in the station license and take it out of service, this happens rarely if ever. A more likely scenario is an increase in media availability as a new station enters the market.

424. If we were to adopt a usage measure designed to reflect our concern with local news and current affairs, we would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. We believe that this type of content analysis would present both legal/Constitutional and data collection problems. News and current affairs content is not necessarily limited to regularly-scheduled news programs. So we could be faced with deciding which other programs were news and current affairs, whether some portion of a program not primarily news should count as news, and, indeed, whether portions of a news report devoted, e.g., to movie reviews should count as news. Overall ratings or (in the case of newspapers) subscription data would not suffice. Someone who subscribes to a daily newspaper but only reads the (nationally-distributed) comics and the classified advertisements is undoubtedly getting a valuable service, but it is not clear that the service has anything to do with news and current affairs. Similarly, a television station that attracts large audiences by virtue of its

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[937] Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L. J. 249, 277 (2001) (quoting *U. S. v. General Dynamics Corp.*, 415 U.S. 486, 501 (1974)).

movies and national sports programming provides an important service, but it would be misleading to judge the station's importance as a local news outlet by its overall ratings.

425. Ultimately, our goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public. This goal, the limitations of current usage as a predictor of future usage, and the content classification requirements for implementing a usage measure all lead us to adopt an "equal share" approach to weighting outlets within the same medium.

426. We deviate from this approach only in the case of the Internet. We use subscription shares to divide the Internet category among the two current significant sources of Internet access—telephone companies and cable companies. In order to determine the number of subscribers to telephone company based Internet access, it is necessary to add together "dial-up" and DSL subscribers. Dial-up service is available to anyone with a telephone line and offers a low-capacity connection (up to 56 kbps). DSL service offers much higher speed connections, but, due to the requirements of the technology and certain physical limitations of the telephone distribution network, it is not available everywhere. Cable companies offer high speed Internet access, and most cable plant has been upgraded to support this service. Some applications, such as viewing video clips of news and other content, are not fully supported by dial-up services. Trade and industry sources estimate that, as of the end of 2002, 85 million households had access to cable high speed Internet service and 11.3 million subscribed.[938] This leaves over 15 percent of households without access to cable modem service. Moreover, it is not clear how the areas in which cable modem service is unavailable compare to the areas in which DSL is unavailable. We therefore think it prudent to use subscriber figures to

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[938] *See Cable and Telecommunications Industry Overview 2002 Yearend*, at *http://www.ncta.com/industry_overview*.

calculate how to divide the Internet category between cable and telephone companies.

427. Table 78 of FCC MOWG Study No. 8 provides information on Internet access. Respondents who said they have home access to the Internet were asked a follow-up question regarding how they access the Internet. The answers (in percentages) were as follows: cable line 18.9 percent, DSL line 14.7 percent, telephone line 66.1 percent, other 3.5 percent, don't know 5.9 percent, and refuse 0.5 percent. The responses sum to 109.6 percent. If we take the 99.7 percent of respondents who picked cable, DSL, or telephone line as the base, and if we combine telephone and DSL, the resulting shares are 19 percent cable and 81 percent telephone. We recognize that, given the relatively small share of Internet in the total diversity market (12.5% weight), using subscriber shares rather than equal availability for Internet providers has a very small impact on our Diversity Index calculation.[939] In this regard, however, we reject the argument made by some commenters that we should not include the Internet at all. They argue that people only utilize the Internet to access their newspapers' and local broadcast stations' websites and,

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[939] As explained in the next section, "Calculation Methodology," our diversity index is calculated by squaring relevant market shares. If we were to assume that the two Internet sources had equal shares, the contribution to the index of Internet would be 78 points. The assumption we use as described in the text leads to a contribution to the index of 109 points. We do not attribute common ownership to Internet Service Providers, *e.g.*, even if Cox owns a television station and the local cable ISP in a market, we will not combine their market shares for the purposes of the Diversity Index calculation. We will assume (subject to examination at the next biennial review and to future findings we might make in our cable modem proceeding), that ISPs do not restrict subscriber access to Internet content based on the identity of the content provider. We also note that, as explained above, we are looking at the availability of news and information sources generally -- and websites particularly -- not their popularity.

therefore, the Internet does not add to diversity.[940] Although many local newspapers and broadcast stations maintain websites with news content, that does not begin to plumb the extent of news sources on the Internet. Some websites compile news from numerous sources, many of which an individual may not have know of or known how to access (*e.g.*, The Drudge Report). Others are unique to the Internet (*e.g.*, Salon). Moreover, we include the Internet because, as previously indicated, we are looking at availability of media, not the popularity of specific publications, stations, cable channels, or websites. There is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events. We cannot pretend that these are not in the "diversity" mix simply because only a small number of people may visit them.

e. Calculation Methodology

428. The Diversity Index is structured like an HHI, i.e., it is simply the sum of squared market shares. As explained above, squaring market shares, unlike measures based on the "raw" market shares, permits construction of an index that takes account of the market shares of all providers in the "market" for viewpoint diversity. As noted above, the geographic market we are using is local. We currently define television markets in terms of the Nielsen DMA. DMAs are exhaustive classifications, covering the entire United States, and it is straightforward to count the number of television stations in a DMA. We are including public as well as commercial stations. Public stations provide viewpoint diversity; indeed that is a specific part of their mandate. Although they do not have the

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[940] *See, e.g.*, AFL-CIO Comments at 12-14, (citing Consumer Union Comments in MM Docket No. 01-235, Douglas Gomery, *The FCC's Newspaper-Broadcast Cross-Ownership Rule: An Analysis* (Econ. Policy Inst., Feb. 2001)); AFTRA Comments at 10; UCC at al Comments at 23.

same programming incentives that commercial stations do, their partial reliance on viewer contributions means that they, like commercial stations, must be sensitive to the demands of their audience. We choose not to include television stations from outside the DMA in question, even if they obtain a measurable audience share in the DMA. Our focus is on local news and current affairs and it is not reasonable to assume that stations outside of the DMA in question will devote significant resources to news and current affairs programming targeted to that DMA. Our cable television signal carriage rules generally permit a television broadcast station within a DMA to obtain cable carriage throughout the DMA, and our DBS signal carriage rules generally ensure that all television stations within a DMA are treated the same with respect to satellite retransmission.[941] For this reason, we assume that all television broadcast stations in a DMA are available throughout the DMA. As explained above, each broadcast television station receives an equal share of the broadcast television weight.

429. We combine the television stations in each DMA with the radio stations in the Arbitron radio metro with which the DMA is paired. There are 287 Arbitron radio metros in the country. Each one is smaller than the DMA within which it lies.[942] Arbitron radio metros do not cover the entire country. More sparsely populated areas are not included in radio metros; approximately one-half of radio stations are not in a metro market. As explained below in the cross-media limits section of this *Order*, we use the Diversity Index to help us identify markets that are "at risk" for excessive concentration in the "viewpoint diversity market." Once those markets have been identified, and cross-media limits imposed, the actual implementation of the cross-media diversity limits will not require information on a local radio market, only on the

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[941] *See* 47 C.F.R. § 76.56 (Cable) and § 76.66 (DBS).

[942] Most radio metros lie wholly within a single DMA; virtually all of the others are predominantly within a single DMA.

television market (DMA) within which the radio stations are located that are part of a proposed merger. As detailed in the cross-media limits section, the analysis that we use to identify at-risk markets is based on examination of a substantial sample of the 287 Arbitron radio metro markets.

430. Daily newspaper publication and circulation data are not collected based on Arbitron radio metros. A different market concept, developed by the Department of Commerce, is used by the industry. The basic building block is the "Metropolitan Statistical Area," or "MSA." The Department of Commerce recognizes 318 metropolitan areas, which include 248 MSAs, 58 "PMSAs" (primary metropolitan statistical areas), and 12 "NECMAs ("New England county metropolitan statistical areas"). For Diversity Index calculation purposes, these areas are matched to Arbitron radio metros. Each daily newspaper that is locally published in the metropolitan area is included in the market. The daily newspaper share of the Diversity Index is divided evenly among all daily newspapers included in the market. In the absence of market-specific information on weekly newspaper availability, we make the most conservative assumption that there is one independently-owned weekly newspaper in each local market, and assign to it the entire weekly newspaper share.[943]

431. In terms of calculating the Index, within each medium we combine commonly-owned outlets and calculate each owner's share of the total availability of that medium. We then multiply that share by the share of the medium in question in the total media universe (television plus newspaper plus radio plus Internet). Once these shares in the overall "diversity market" have been calculated, we add together the shares of properties that are commonly-owned (e.g., a newspaper and a

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[943] In fact, there were 7,689 weekly newspapers in 2000, so it is likely that the average market has at least one weekly. *See* NAA, *supra* note 200 at *http://www.naa.org/info/facts02/13_facts2002.htm.*

television station), square the resultant shares, and sum them to get the base Diversity Index for the market in question.[944]

4. Cross-Media Limits

432. In this Section we modify our rules by adopting a new set of cross-media limits ("CML") in lieu of our former newspaper/broadcast and television/radio cross-ownership rules.. The CML have been designed specifically to check the acquisition by any single entity of a dominant position in local media markets -- not in economic terms, but in the sense of being able to dominate public debate -- through combinations of cross-media properties. Because we have traditionally relied upon blanket prohibitions on certain cross-media combinations, we have never before had to confront head-on the challenge of identifying specifically which types of markets give us the greatest cause for concern in terms of preserving diversity of viewpoint, and which types of transactions are most problematic in this regard. This effort is complicated by the nature of the public interest we are seeking to protect – diversity – which is as elusive as it is cherished.

433. Our modification of the newspaper/broadcast and television/radio cross ownership rules into a set of cross-media limits or CML is our first comprehensive attempt to answer this difficult and complex set of questions. The CML derives from data in the record regarding the relative reliance by consumers of various types of media outlets for news and information. To help us analyze that data, we use a methodological tool – a diversity index or "DI" – that allows us to measure the degree to which any local market could be regarded as concentrated for purposes of diversity. Based on an analysis of a large sample of markets of various sizes, the diversity index suggests that the vast majority of local media markets are healthy, well-functioning, and diverse.

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[944] Appendix C, Diversity Indices in Ten Sample Markets, contains the Diversity Index calculations for the ten markets examined in MOWG Study No. 1, based on the market structure as of November 2002.

434. Moreover, because we are adopting herein intra-service competition caps for radio and television properties, those caps will ensure that local markets will continue to be served by a diversity of voices within each of these respective services. By the nature of the exercise, markets defined for competition purposes are no broader than, and generally are narrower than, markets defined for diversity purposes. Thus, our radio and television competition caps will not only serve to promote and protect competition within the radio and television services, they will also be protective of diversity interests when television-only or radio-only transactions are at issue. For example, in a market with 12 TV stations, our intra-service caps guarantee at least six different owners of television stations. If there are forty radio stations in the market, our radio cap will ensure at least six different owners of radio properties.

435. We recognize, however, that our intra-service caps will not address diversity concerns that may result from cross-media combinations. Although our local radio and television caps will ensure a significant number of independent voices in larger markets, cross-media combinations in very small markets might result in problematical levels of concentration for diversity purposes. Accordingly, we are herein supplementing our two intra-service local rules with a narrowly drawn set of cross-media limits to reach those combinations that are not already prohibited by our television or radio caps, but which would give rise to serious diversity concerns. The cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice. Although we rely in part on our data analysis to help define the CML, we clearly respect that diversity is inherently subjective and cannot be reduced to scientific formula. We do believe, however, that greater use of empirical data and evaluation of that data can significantly strengthen the reasoning that underlies our expert judgment. The CML, therefore, ultimately rests on our

independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity.

a. Competition Caps Protect Diversity

436. As set forth above, we have adopted a cap both on the number of television stations that any one owner may hold in a market, and on the number of radio stations that any one owner may hold in a market. These caps were designed to promote and protect competition within these two distinct services. The caps are, therefore, based on product market definitions that consider only those products or services that may be regarded as reasonable substitutes for competition purposes. We recognize, however, that although radio and television outlets may not compete in economic terms with other types of speech outlets, *e.g.*, newspapers, they all inhabit the mass media landscape that Americans turn to for news and information. In that sense, whatever the confines of their markets for competition purposes, many different outlets serve core democratic functions as purveyors of ideas, outlets for opinion, and distributors of news.

437. The data in the record evidence this difference. As set forth above, radio and television compete in economic terms in separate and distinct product markets. Both radio and television outlets, however, inhabit the larger speech market, as do several other types of entities. For example, MOWG Study No. 8, a consumer survey on media usage, reveals that, when asked to identify their primary source of all news and information -- both local and national -- , approximately 40% of Americans responded that broadcast television was their primary source and approximately 10% of Americans responded that radio was their primary source.[945] However, nearly 24% of respondents identified daily newspapers as their primary source of news and information, 18% identified cable

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[945] MOWG Study No. 8, Table 20.

news networks, 6% identified the Internet, and 2% identified weekly newspapers or magazines.[946] These figures track closely results from a Pew Research Center survey asking similar questions about Americans' use of media for news and information. When asked where they turned for their primary source of election news, 39% of respondents said broadcast television, 24% said cable television, 24% said newspapers, 9% said radio, and 5% said the Internet.[947] Other studies confirm that, today, Americans substitute among and between many different sources for news and information on a regular basis.[948] The record reflects, in short, that the "viewpoint" market in which television and radio stations participate is broader than the economic product markets, as defined by standard competition theory, in which either competes.[949] As a result, intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes.

438. Our diversity index helps to illustrate this point. Pursuant to our new local radio rule, no single owner, even in the smallest markets, will own more than 50% of the radio outlets. In larger markets, the percentage of radio outlets that can be held by any one entity is considerably smaller. Thus, using the most extreme set of facts, and using Altoona, Pennsylvania, as our test case, the diversity index focused on local news and information alone (again, the most conservative assumption) reveals a relatively minimal impact on viewpoint diversity even should the radio outlets become split between only two owners. The current base case DI for local news and

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[946] *Id.*

[947] The Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Apr. 27, 2003) at *http://people-press.org/reports/display.php3?PageID=243.*

[948] *See, e.g.*, UCLA Internet Report.

[949] Fox Comments, Owen Statement.

information for Altoona is 960.[950] If the local radio market were to become restructured into a duopoly, the DI would rise to only 1,156.[951] Again, this hypothetical posits the most extreme restructuring of radio outlets in the smallest market among those in our test cases. The change in the diversity index will be far smaller as a result of radio transactions in larger markets or where the restructuring is less extreme.

439. Similarly, pursuant to our new local television rule, no single owner will be permitted to own more than two television outlets in most markets. Using Altoona again, a two-TV combination raises the base DI for local news and information by only 64 points.[952] Indeed, using a set of randomly sampled markets of varying sizes, the average change in DI as a result of an owner of one television property buying another to create a television duopoly in a small market with only five licensed television stations is 91.[953] In markets with twenty licensed television stations the change in DI as a result of the creation of a television duopoly is only six.[954] Thus, although our intra-service television and radio caps are designed to protect and promote competition, they have a corollary benefit of also guarding against concentration in the viewpoint markets, at least with respect to intra-service combinations.

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[950] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[951] *Id.*

[952] *Id.* In running this sample case, we assume that a duopoly would be permitted in the market even though, in fact, a new duopoly would not be permitted in Altoona under our new local television cap (Altoona has five stations and one existing duopoly; a second therefore would violate our top four restriction).

[953] *See* Appendix D, Diversity Index Scenarios.

[954] *Id.* We note, also, that our local television ownership cap includes a prohibition on top-four combinations. This will have the effect of prohibiting combinations of the local television stations most likely to produce and carry significant local news programming. Thus, although the top-four restriction is based on competition theory, the rule will also have beneficial effects on local diversity.

440. We recognize, however, that cross-media combinations that may impact the range and diversity of voices in local markets will not be captured by our television and radio caps. We therefore adopt, as described below, new cross-media limits targeted specifically and solely at the types of transactions that would give us the most concern and which are not already prohibited by our intra-service caps.

b. Foundations of the Cross-Media Limits

441. We begin with the proposition that, because this rule will limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection – newspapers), we should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression.[955] We also recognize that the tools that we are using to evaluate market diversity involve as much art as science. "Diversity" is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations. Although we attempt to measure it and assign some quantitative value to it in order to understand relative diversity of different types of markets, we recognize that this process is inherently approximate.[956] We must exercise great care, therefore, before categorically prohibiting any particular transaction or set of transactions as a prophylactic matter.

442. Nonetheless, it is apparent, based on the record in this proceeding, that certain types of transactions in certain markets

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[955] *See* FOEF Comments at 41-42; WVRC Comments at 43-44.

[956] Using the Diversity Index allows us to see different market characteristics in markets of different sizes. We have also found, however, that differentiating markets by the number of newspapers present is too blunt while differentiating markets by the number of radio stations is too fine. Therefore, we use the number of television stations as an identifier of market size.

present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.[957] Using our diversity index analysis and our independent judgment regarding desired levels of diversity, we first identify "at-risk" markets that might already be thought to be moderately concentrated for diversity purposes. We then identify the types of transactions that pose the greatest risk to diversity, and impose specific limits on those transactions in at-risk markets. Finally, because certain transactions in less concentrated markets pose a high risk of rapid concentration, we impose separate restrictions on transactions outside of the at-risk markets.

c. Identifying At-Risk Local Markets

443. We begin by identifying those markets most susceptible to high levels of viewpoint concentration; *i.e.*, those markets where our diversity concerns cut most deeply. At the outset, consistent with our past practice and precedent, we focus in this regard on local, not national, viewpoint market(s).[958] Evidence in the record before us supports the conclusion that the number of outlets for national news and information is large and growing, and that government regulation is thus unnecessary to protect it.[959]

444. With respect to local markets, our ten city study and our DI test cases reveal that most local markets today are well-functioning, healthy markets for speech.[960] For example, as of 2000, the largest media market in the country, New York City, had 184 different media outlets owned by 114 different

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[957] *Cf. 1975 Multiple Ownership Second Report and Order*, *supra* note 33 (in which we required divestiture in "egregious" newspaper/broadcast cases).

[958] *See* Policy Goals Section III, *supra*, and the Diversity Index, Section VI(C)(3), *supra*.

[959] *See* Appendix B, National News Sources.

[960] *See* MOWG Study No. 1.

owners.[961] Perhaps more impressively, the Burlington/Plattsburgh market – market 141 out of 287 – had 53 outlets owned by 34 different owners.[962] Even Altoona, Pennsylvania, market 255, had 23 outlets owned by 15 different owners.[963] That is, in the 255th ranked market, there currently are fifteen different independent voices.

445. Not all voices, however, speak with the same volume. Using our Diversity Index, we have examined the concentration of media outlets in the ten markets that were the subject of our Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989.[964] Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758.[965] A DI of 758 is the equivalent of 13 equally-sized firms.

446. Moreover, to ensure that the results of our ten city study were not anomalous, we have calculated the average DI for a different set of randomly selected markets, both large and

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[961] *Id.* Even though both MOWG Study No. 1 and Appendix C (Diversity Indices in Ten Sample Markets Study) used the same media markets, the number of outlets and owners in individual markets as described in MOWG Study No. 1 are different from the number of outlets and owners in Appendix C, Diversity Indices in Ten Sample Markets, for two reasons. First, MOWG Study No. 1 used outlet and ownership data that was current in 2000, in order to make a comparison between 1960 and 1980. The Diversity Indices in Ten Sample Markets Study used more current outlet and ownership data from 2002, in order to be more up-to-date. In addition, MOWG Study No. 1 included the "embedded" radio metro markets that are physically in the NYC metro, for illustrative purposes. The Diversity Indices in Ten Sample Markets Study used only the radio stations assigned to the NYC metro, for analytical purposes.

[962] *Id.*

[963] *Id.*

[964] *Id.*

[965] *Id.*

small.[966] The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635; and the average DI for markets in which there are 5 television stations is 911 – all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.[967]

447. We believe the analogy to the HHI is apt. The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market. Our DI, which was inspired by and modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, we can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help us, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

448. Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally- sized firms normally can be considered fully competitive.[968] A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six

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[966] *See* Appendix D, Diversity Index Scenarios.

[967] *Id.*

[968] A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis. *See DOJ/FTC Merger Guidelines* § 1.51.

roughly equal voices. Using our DI analysis of sample markets, we note that it is not until we reach markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.[969]

449. Our DI analysis of these sample markets, however, is not the end of our inquiry. Because of the importance we associate with maintaining diversity among the three principal platforms – newspaper, radio and television – for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content,[970] we previously have used a "voice test" focused on one or more of these outlets for measuring diversity. Indeed, the *Sinclair* court suggested that our choice of an eight-voice test, then used in conjunction with the local television rule, was an exercise of agency discretion entitled to some deference.[971] Although we no longer are willing to base our rules upon the comparatively rudimentary eight-voice test, we continue to believe that unacceptable diversity losses can occur in very small markets when the principal distribution platforms for local news content come under common ownership and control. In larger markets, we expect that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information.[972]

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[969] *See* Appendix D, Diversity Index Scenarios. The average DI for markets with three television stations is 1027; the average DI for markets with two television stations is 1316; and the average DI for markets with a single television station is 1707.

[970] CFA Comments at 32-39; UCC Comments at 23.

[971] *Sinclair*, 284 F.3d at 162.

[972] *E.g.*, *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd 20913, 20918 (2000) (broadband access in rural areas limited); *2001 Price Survey Report*, 17 FCC Rcd 6301, 6318 (2002) (low capacity cable systems in rural areas

450. Finally, we are concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions. Accordingly, in defining "at-risk" markets, we have used our DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local news and information.[973] In so doing, we have focused on the types of transactions that most likely will lead to large DI changes and rapid concentration. Our line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues. Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, we have found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change.[974] Based on our analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a

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offer fewer channels and are less likely to have stand-alone local or regional cable news channels).

[973] *See* Appendix D, Diversity Index Scenarios.

[974] Under the *FTC/DOJ Merger Guidelines*, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market. Where the post-merger market would be in the moderately concentrated range, the *Guidelines* suggest that a merger that increases the HHI by more than 100 points will, absent other factors, present antitrust concerns. Where the post-merger market would be in the highly concentrated range, the *Guidelines* suggest that a merger producing an increase in the HHI of more than 100 points, absent other factors, is presumed to create or enhance market power or facilitate its exercise. *FTC/DOJ Merger Guidelines* ¶ 1.51. However, in the cases we found over the past 15 years, the FTC or the DOJ has filed suit to block a merger only when the change in the HHI is at least four times greater than the *Guideline's* standards. *See, e.g., FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131 (N.D. Ill., E. Div. 1988); *U.S. v. Georgia-Pacific Corp.*, 1996 W.L. 634212 (D. Del. 1996). In the majority of cases, the proposed merger would have resulted in a change in the HHI in excess of 1,000 points.

change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.[975] For example, a newspaper/radio combination in markets with only two licensed television stations produces a DI change of more than 300 points, a television/radio combination in markets of that size produces a DI change of 301 points, and a newspaper/television combination in markets of that size produces a DI change of 731 points. A newspaper/television combination in a market with three licensed television stations produces a DI change of 331 points.[976]

451. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets. Nonetheless, based on all of the foregoing, we conclude that a market with the equivalent of ten or more equally-sized firms cannot be regarded as even moderately concentrated for diversity purposes. In light of that conclusion, and in consideration of the properties of small markets and on our analysis of potential transactional impacts in those markets, we conclude that markets with three or fewer licensed television stations should be regarded as "at-risk" markets for purposes of diversity concentration. Markets of that size, we expect, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties.[977] Accordingly, we will prohibit certain cross-

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[975] *See* Appendix D, Diversity Index Scenarios.

[976] The calculated changes in the Diversity Index for these markets are premised on the assumption that the radio markets have consolidated to the maximum extent permissible under our new local radio ownership rule. On this basis, this is a "worst case" estimation of the impact of newspaper/radio and television/radio combinations under the Diversity Index.

[977] A market with an HHI of more than 1800 is regarded as highly concentrated. We noted above that a DI of 1800 would correspond to six equally-sized "voices." Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw

media combinations involving those properties in markets with three or fewer television stations.[978]

d. Local Cross-Media Limits in At-Risk Markets

452. With respect to the limits themselves, we tread lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). Our intent is to draw our rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information.[979] They are, accordingly, the focus of our diversity concerns, and we decline to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

453. Further, we are establishing rules of nationwide applicability. We desire, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive. Indeed, that quality inheres in the nature of

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an absolute line prohibiting transactions that would take a market beyond the 1800 DI (*i.e.*, six voice) level. The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated – in a qualitative sense – for diversity purposes.

[978] When we originally crafted the newspaper/broadcast rule we required divestiture of either a newspaper or a broadcast station in a limited number of so-called "egregious" cases. We defined the relevant market in those cases as the area encompassed by the city-grade signal of the relevant broadcast station. Divestiture was required where the only daily newspaper was published in a community within the city-grade signal of the only commercial television (or only commercial radio station in cases where no local TV station also existed) where the newspaper and the broadcast station were commonly owned. *See generally 1975 Second Report and Order*, *supra* note 33.

[979] *See* MOWG Study No. 8, Table 97.

proscriptive rules themselves. Nonetheless, our analysis of the record in this proceeding gives us confidence that our rules will prevent the transactions that would seriously impair the availability of diverse viewpoints in any local market while permitting efficiency enhancing combinations. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media industries generally. Accordingly, except as specifically prohibited herein, cross-media combinations will not be subject to anything other than routine Commission review, i.e., unless the transaction is barred by the CML or our other ownership rules, the combination is permissible under our rules, and we will not apply the DI to it.[980]

454. As explained below, combinations of daily newspaper and broadcast properties in at-risk markets present a serious threat to local viewpoint diversity.[981] We therefore, adopt a rule prohibiting common ownership of broadcast stations and daily newspapers, and TV/radio combinations, in markets with three or fewer television stations. In order to determine which markets have 3 or fewer broadcast television stations, we will rely on Nielsen television Designated Market Areas (DMAs). We include for these purposes, commercial and noncommercial television stations assigned to the DMA. This is consistent with our overall measurement of the DI, explained above, as we

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[980] Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets. Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.

[981] *See, e.g.*, NABOB/Rainbow, PUSH Comments at 23-24; Gray Comments at 16-19.

assume that all television stations in the DMA are viewable in the radio metro with which it is paired.[982]

455. A number of parties have questioned whether a cross-ownership rule applicable to entities other than broadcasters, *e.g.*, newspaper owners, would be constitutional.[983] We continue to believe that a narrowly-drawn rule prohibiting or limiting common ownership of broadcast properties and daily newspapers is consistent with our constitutional framework. Our current newspaper/broadcast cross-ownership rule has been upheld by the Supreme Court against constitutional challenge[984] and, as discussed above,[985] broadcast/newspaper and radio/television cross-ownership rules, like broadcast ownership rules, are reviewed under the rational basis standard.[986] We believe that our new cross-media limits satisfy this standard because they are "a reasonable means of promoting the public interest in diversified mass communications,"[987] and they are founded on a substantial record. Nevertheless, we are mindful of the court's concern in another context, where a higher standard of constitutional scrutiny applied, that our rules should focus on those markets and transactions that are likely to result in substantial, rather than only incremental, changes in diversity.[988] Our new cross-ownership rules accomplish this because they are narrowly tailored to restrict cross-ownership only in select markets.

456. *Television-Newspaper.* Nielsen survey data reveal that daily newspapers and broadcast television remain the two most

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[982] *See* ¶ 428, *supra.*

[983] Media General Comments at 37; Tribune Comments at 17-28; Fox Comments at 50-51.

[984] *See NCCB, supra*, note 20.

[985] *See* Legal Framework, Section II, ¶¶ 13-16, *supra.*

[986] *Id.*

[987] *NCCB*, 436 U.S. at 802.

[988] *Time Warner II*, 240 F.3d at 1135.

important sources of local news and information.[989] The importance of these outlets is reflected in our DI. As noted above, a combination of a daily newspaper and a television station in a market with only three television stations leads to an average DI change of 331 points. These combinations in markets with only two or one television station lead to DI changes of 731 and 910 DI points, respectively. In these at-risk markets, a single combination of a daily newspaper and a television station could quickly jeopardize the range of viewpoints available to consumers in the market. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast television facility in any market with three or fewer television properties. To trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication. We presume that broadcast television stations are generally carried throughout the DMA to which the station is assigned. Our rules will not, however, bar a broadcast television station in such a market from starting a new newspaper, as that would expand, not decrease, diversity.

457. One additional issue in the cross-interest context is the definition of "daily newspaper" for the purposes of newspaper/broadcast cross-ownership. Currently, Note 6 to the multiple ownership rule defines a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the

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[989] Approximately 28.8 percent of Americans rely on newspapers as a source of local news and information, and 33.8 percent use broadcast television for this purpose. These figures are derived from normalizing the figures in MOWG Study No. 8, Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Also, magazines were excluded from the normalizing process as they typically are not sources of local news.

community of publication."[990] Commenters raised the issue of the English language requirement when applied in Puerto Rico where the Spanish language is the dominant language.[991] Caribbean argues that the Commission expressly rejected requests to exempt Puerto Rico from the rule at the time of its adoption and recognized that the goals underlying the rule were of equal concern in Puerto Rico as on the mainland.[992] Both Caribbean and Arso argue that the exclusion of foreign language newspapers also allows for the exercise of market power by the dominant newspapers in Puerto Rico which, due to the exclusion of non-English newspapers, could be owned in tandem with broadcast stations in the market.[993]

458. The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. As Caribbean notes, in adopting the original newspaper/broadcast cross-ownership rule, the Commission recognized that the need for diversity in Puerto Rico was the same as that elsewhere. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish has spoken has approximately doubled.[994] It is appropriate, therefore, at this point in time, that we apply the CML to non-English daily papers in markets in which the language that they are printed in is the dominant language of their market.[995] While the example of Puerto Rico was

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[990] 47 C.F.R. § 73.3555 Note 6.

[991] Arso Comments at 1-4; Caribbean Comments in MM Docket No. 01-235 at 22-35.

[992] Caribbean Comments in MM Docket No. 01-235 at 22.

[993] *Id.* at 30-38. Arso Comments at 3-4.

[994] In 2000, Spanish was the language spoken at home in 10.5 % of American households. *See www.census.gov*. In 1980, the percentage was 5.3%. This is derived from data contained in INFORMATION PLEASE ALMANAC (Otto Johnson ed., Houghton Mifflin Co. 1995) at 835.

[995] As previously indicated, to trigger the rule, we will count all television

addressed in the comments, there may be other communities to which this will apply now or in the future. Those whose primary language is not English deserve the same protections of diversity and competition as do English speakers. Accordingly, for purposes of applying the CML to newspaper/broadcast transactions we will change the definition of daily newspapers to include non-English dailies printed in the primary language of the market.

459. *Radio-Newspaper.* Although broadcast radio generally has less of an impact on local diversity than broadcast television, according to the results of our Nielsen survey, discussed above, in at-risk markets the combination of a daily newspaper with one or more broadcast radio facilities can nonetheless have significant negative implications for the range of viewpoints available. Indeed, markets with three or fewer television stations have, on average, only 21 radio stations.[996] Under our radio cap, a single owner in a market with 21 stations could own six stations, or 29% of all the radio outlets in the market. Combining such a station group with, perhaps, the only daily newspaper could, therefore, seriously impair the range of independent viewpoints available in the market.[997] Again, based on a sample of markets with three or fewer television outlets, we find that the change in DI as a result of a newspaper-radio combination, assuming that the radio owner has reached the radio ownership cap under our new local rules,

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stations assigned to the DMA that contains the newspaper's community of publication. For the purposes of evaluating whether the non-English daily is printed in the primary language of the "market," however, the market shall be defined as the newspaper's community of publication.

[996] BIA Master Access Data Base (Nov. 2002).

[997] Although any given market may have more than one daily newspaper, and of course every radio owner does not buy stations up to the regulatory limit, we are adopting general rules of nationwide applicability. Accordingly, we are positing for these purposes that the market is as concentrated as possible consistent with our other local rules.

would be 242 points or higher.[998] Given that markets of three television outlets begin with an average DI of 1027, which we regard as the beginning of the moderately concentrated range, a 242 point DI increase moves the market substantially toward a highly concentrated state. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast radio facility in any market with three or fewer television properties.[999] To trigger the rule for newspaper/radio combinations we will retain our current standard. That standard requires complete encompassment of the newspaper's community of publication by the requisite signal strength contour of the commonly owned radio station(s).[1000]

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[998] *See* Appendix D (Diversity Index Scenarios).

[999] Again, we note that this rule does not apply in the event that a broadcast licensee seeks to found a new daily newspaper in the market.

[1000] For AM radio stations that standard is complete encompassment of the newspaper's community of publication by the predicted or measured 2mV/m contour computed in accordance with § 73.183 or § 73.186 of the Commission's Rules. For FM radio stations the standard is complete encompassment of the newspaper's community of publication by the 1 mV/m contour computed in accordance with § 73.313 of the Commission's Rules. Previously, we discussed the inherent flaws in defining radio markets using a contour-based definition, and decided to move to a geographic based definition. Specifically, we found that a contour based definition for defining radio markets can create inconsistencies in counting stations that comprise a market, counting stations that an entity owns in a market, and determining a radio market's size and geographic area. *See* Local Radio/Problems with the Existing Radio Market Definition and Counting Methodologies, Section VI(B)(1)(a)(ii)(a), *supra*. However, such problems do not arise in the context of using contours to determine whether the cross-media limits rule is triggered. Here, we are concerned with the physical proximity of the broadcast station and the newspaper's community of publication, or in the case of radio/television cross-ownership, we are concerned with the relative distance between two specific stations. Because the cross-media rule relies, in part, on a geographic location, *i.e.* the community of publication or the communities of license, parties cannot take advantage of such discussed inconsistencies to circumvent the rules. Moreover, we are not relying on a contour-based definition to define a cross-media market; we are only using it to determine whether the rule is

460. *Television-Radio.* Combinations involving daily newspapers and broadcast properties are not the only cross-media combinations that present diversity concerns in at-risk markets. Approximately one-fourth of Americans rely on radio as a source of local news and information, and one-third use broadcast television for this purpose.[1001] Cross-media combinations involving television and radio properties also, therefore, are likely to give rise to systematic diversity concerns in at-risk markets. Our DI analysis confirms this fact.[1002] We therefore adopt a rule prohibiting the combination of broadcast radio and broadcast television facilities in any market with three or fewer television properties. In such markets, we will not permit an owner of a TV station to own any radio stations in the market, and vice versa. Although this modification is more stringent than our current radio/TV cross-ownership rule in a limited number of markets,[1003] the overall thrust of our CML approach has been to eliminate regulatory restrictions where they are unnecessary.[1004]

461. The television/radio cross-ownership rule is triggered when the radio station's community of license is in the commonly owned television station's DMA. Similar to requests for waiver of the newspaper/broadcast cross-ownership rule, parties seeking waiver of the television/radio

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triggered.

[1001] MOWG Study No. 8, Table 097. The figures above are derived from normalizing the figures in Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Magazines were excluded from the normalizing process because they typically are not used for local news.

[1002] *See* Appendix D, Diversity Index Scenarios.

[1003] 47 C.F.R. § 73.3555(c).

[1004] We discuss grandfathering of existing combinations in these markets below. See Grandfathering and Transition Section VI(D), *infra.*

cross-ownership rule can rebut this by showing that the stations' signals do not overlap and the television station is not carried on cable systems in the radio station's market.

5. Additional Cross-Media Limits in Small to Medium-Size Markets

462. Although markets with four or more licensed television stations do not qualify, in our judgment, as at-risk markets, a combination of a daily newspaper with a television duopoly and a significant radio presence can, in small to medium-size markets result in substantial changes in the level of diversity. For example, assuming that owners of broadcast properties are constrained only by our local radio and television caps (*i.e.*, they may acquire stations up to the cap in either service), a newspaper owner might attempt to acquire a television duopoly and several radio properties within the same market. Referring again to our sample markets we find that, in a five-television market, a combination of a newspaper, a television duopoly, and as many radio stations as permitted by the applicable local radio cap results in an average DI change of 846 points. Indeed, even in an eight-television market, the resulting average DI change from such a newspaper/TV duopoly/radio combination DI is 734 points. Given that eight-television markets begin, on average, with a DI of almost 900 points, changes of this magnitude can lead quickly to a highly concentrated market.

463. We notice a dramatic difference, however, in the base DI, and in the DI changes that result from a combination involving a newspaper, a TV duopoly, and a radio station group, between our sample markets that have four to eight television stations and those that have nine or more television stations. The base DI for markets with eight television stations is still almost 900 points – nearly in the moderately concentrated range; there is almost a 200 point difference between these markets and those with nine television stations, which, in our sample, have a base case DI of 705 points. In

addition, although a newspaper/TV duopoly/radio combination produces a change of over 700 points in an eight television market, bringing the DI up to approximately 1600 points, the change is fewer than 500 DI points in a nine television market, bringing the DI up to only 1200 points. These numbers accord with our experience and judgment regarding the operation of small to medium-size markets, and are supported by other evidence in the record.[1005]

464. We also note significant differences between the DI changes that result from newspaper/TV combinations in markets with between four and eight television stations and those with nine or more television stations. Using our sample markets, a newspaper combining with a television duopoly in a market with only five television stations leads to an increase in the DI of 376 points. Even in markets with eight television stations, the average DI increase as a result of such a combination is over 300 points. In markets with nine television stations, however, the DI increase from a merger of a newspaper with a television duopoly is only 172 points; it is about 100 points in markets with ten televisions.[1006] The potential for rapid concentration that may result from a combination of a newspaper with a television duopoly in markets with between four and eight licensed television stations ("small markets") leads us to conclude that it would be prudent, in these markets, to impose additional local ownership restrictions as part of our CML.

[1005] *See, e.g.* Buckley Comments at 4-5; UCC Comments at 16-17, 40-41.

[1006] Because of the number of radio stations in the markets observed for our sample of seven-television-station markets, the DI increases in those markets are smaller than those in eight TV markets. This deviation does not undermine, in our judgment, the more general conclusions that we draw from the data and from our DI methodology regarding the markets most at risk for viewpoint concentration (*i.e.*, we do not deem markets with seven television stations, in general, to be less at risk than markets with eight television stations).

465. We are cognizant, however, of the fact that substantial public interest benefits may flow from broadcast/newspaper combinations. As discussed above, television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation. Because of the news resources available to local newspapers, we expect similar benefits to be associated with newspaper ownership of radio stations (*e.g.*, radio stations affiliated with a local newspaper may have an enhanced ability to produce local, all-news radio programming and to cover local political and cultural events in greater depth than stations unaffiliated with a newspaper). Accordingly, we are not inclined to prohibit outright newspaper/ broadcast combinations in markets with 4 – 8 television stations (referred to below as "small to medium size markets").

466. Balancing these interests, we believe it appropriate, in small to medium size markets (those with between four and eight television stations) to allow the following: 1) one entity may own a combination that includes radio, television and newspaper properties, but the entity may not exceed 50% of either of the applicable local radio or the local television caps in the market; 2) a radio station group owner that also owns a newspaper in the market, but which does not own any television properties in the market, may acquire radio stations up to 100% of the applicable radio cap. In these small to medium size markets, therefore, we will prohibit: television broadcasters that also own a daily newspaper in the market from having a television duopoly in that market; a broadcaster with a duopoly from obtaining a daily newspaper in the same DMA; a newspaper owner from purchasing more than a single television station within the DMA; and a radio station owner that also owns a daily newspaper and a television station in the

market from exceeding 50% of the applicable radio cap for the market.[1007]

467. We believe that this CML achieves an appropriate balance in small to medium size markets between fostering the production of high quality local programming and protecting diversity. To begin with, the public interest benefits of newspaper ownership (the benefits of cross-fertilization between media) likely are realized primarily in the first broadcast station co-owned in either service. Although there may be economic benefits to the owner from more extensive combinations, it is not as clear that those benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases. Given that no owner will be permitted, in accordance with our local television cap, to hold more than two television stations in a small to medium size market, a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss of diversity. Although the loss of diversity that might result were that owner to add a significant radio presence in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if the combination does not include any television properties.

468. Again, our DI and a set of sample markets help to illustrate the fact that our modified 50% CML for newspaper

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[1007] For these purposes, we use the Arbitron or contour-overlap market definitions discussed above in determining whether the newspaper and a radio station serve the same market. We are not imposing a limitation that would preclude a top four television station in a market from being combined in common with a newspaper or radio station similar to the restriction imposed in the local television rule context. The top four restriction imposed under the local TV ownership rule is specifically designed to protection competition, as fully discussed in that section. The cross-media limit, on the other hand, is designed to protect viewpoint diversity, not economic competition.

combinations in small to medium size markets will significantly reduce any loss of diversity that might result from efficiency-enhancing newspaper/broadcast combinations. In a five-television station market, a combination involving a newspaper, a TV duopoly and a radio station group at the radio cap would result in an average DI increase of 846 points, which would take the market to 1757 points, near the highly concentrated range.[1008] If the combination is limited to a single television station and no more than 50% of the applicable radio cap, the DI change is 393 points, a decrease of 453 points. In an eight-television market, a combination involving a newspaper, a TV duopoly, and a radio station group at the cap results in an increase in the average DI of over 700 points. By limiting the combination to 50% of both the television cap and the radio cap, the DI increase is reduced to 314 points.

469. Similarly, whereas a combination involving a newspaper and a television duopoly alone will, on average, raise the DI of a five-television station market by 376 points, a combination involving a newspaper and a single television station in a market of that size will raise the DI, on average, only 223 points. The difference is more dramatic in markets with eight licensed television stations, where the average DI increase drops from 308 points to only 152 points for a newspaper/TV duopoly combination. Newspaper/radio group combinations result in significantly lower levels of viewpoint concentration when the combination does not include any TV properties. Accordingly, we will permit newspaper/radio combinations in small to medium size markets, provided they comply with the local radio rule.

470. Similarly, our DI analysis indicates that radio/television combinations in small to medium size markets result in relatively small DI changes. For example, in a market with only four television stations, a radio television combination,

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[1008] Under the *DOJ/FTC Merger Guidelines*, an HHI above 1800 suggests a highly concentrated market.

even assuming the radio owner holds the maximum number of stations permitted under our local radio cap, results in a DI change of fewer than 150 points.[1009] Such a combination in a market with eight television stations results in a DI change of fewer than 100 points.[1010]

471. We have engaged in this analysis using our DI and a randomly selected sample of markets not with the idea of slavishly following the numbers that our index generated, but to confirm and support the judgments we make regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market. As noted above, we do not believe that markets with between four and eight television stations can be regarded as moderately concentrated for viewpoint purposes or otherwise "at risk." We do, however, believe, and our DI confirms, that these markets are approaching a level of viewpoint concentration that we would regard as moderate, and we are concerned that some combinations involving the three major sources of local news and public affairs information in these markets would lead to inordinate diversity losses. Accordingly, we will permit television/radio combinations in small to medium size markets, provided they comply with the local radio and television rules.

472. In markets with 9 or more TV stations, we will permit any newspaper and broadcast cross-media combinations that comply with our local TV ownership rule and local radio rule. These tiers are derived from our DI analysis and our judgment as to what markets are sufficiently diverse so that combined newspaper/broadcast ownership would not unduly harm diversity.

[1009] *See* Appendix D, Diversity Index Scenarios.

[1010] *Id.*

473. With respect to markets with nine or more TV stations ("large markets"), we impose no cross-media restrictions. To begin with, markets of this size today tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners. New York City, for instance, which has 23 licensed television stations, 61 radio stations, and 21 daily newspapers, had 61 different owners of broadcast stations and daily newspapers as of November 2002.[1011] Using our diversity index as a measure, New York City today has a base DI of only 373.[1012] More striking, perhaps, is the example provided by Kansas City, Missouri, which has only nine licensed television stations. Our Ten City Study reveals that Kansas City had 35 different owners and our Diversity Index analysis shows that Kansas City has a base DI today of only 509.[1013]

474. Again, to ensure that the results of our Ten City Study were not anomalous, we conducted a DI analysis on a random sample of markets of various sizes, including markets with nine licensed television stations, markets with ten television stations, markets with fifteen television stations, and markets with twenty television stations. Among our sample markets, the average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is 612.[1014] That is, markets with nine or more television stations today are very much un-concentrated.

475. The local radio and local television caps adopted herein will help to ensure that large markets continue to be served by a large number of different local media owners. For example,

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[1011] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[1012] *Id.*.

[1013] *See* MOWG Study No. 1 and Appendix C, Diversity Indices in Ten Sample Markets.

[1014] *See* Appendix D (Diversity Index Scenarios).

positing Kansas City, Missouri, again as a typical market of nine television stations, and assuming that four television duopolies could in fact be created in that market, and further assuming maximum radio consolidation under our new local radio rule, there should still remain five different owners of television stations and seven different owners of radio stations.[1015] There currently also are five daily newspaper owners serving the market. Therefore, even assuming that, in the absence of any cross-media limit in the market, the owners of the radio, television, and newspaper properties combine to the maximum extent possible, there would remain at least seven different owners of local media in the market, each with a significant presence. In accordance with the mandate of Section 202(h), we do not believe that we can justify a restriction in a market where the worst case scenario (indeed, one that may not even be possible given existing combinations in the market), still results in a market with at least seven different owners of the major sources of local news and information.

476. More realistically, although some cross-media combinations are likely to occur in the absence of a restriction, constraints imposed by existing groups and the presence of public stations that cannot be acquired by commercial entities make it highly unlikely that Kansas City, or any market, will consolidate to the level described in the preceding paragraph. In order to get a better sense, therefore, for the actual affect of various cross-media combinations in markets with nine or more

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[1015] *See* Appendix C (Diversity Indices in Ten Sample Markets). That is, in a market with nine television stations, four duopolies can, in theory, be created, leaving one singleton station, so that five owners of television stations would remain. If there are forty-four radio stations in the market, and group owners assembled the largest combinations possible under the radio cap (seven), there would remain at least seven group owners; six with groups of six stations and one with a group of two stations.

television stations, we use our DI in sample markets and test hypothetical combinations.[1016]

477. Beginning in markets with nine licensed television stations, we see that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under our local radio rule is only 64 points.[1017] If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points, leaving the market below 1000 DI.[1018] If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points.[1019] Indeed, the largest combination possible in the market – a combination that would include a daily newspaper, a television duopoly, and a large radio group – would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range that we would consider moderately concentrated.[1020]

478. As detailed in Appendix D (Diversity Index Scenarios), in markets with ten television stations, the average base DI is 635 and the increase that would result from the assemblage of the largest media combination possible would be 292 points – leaving the market un-concentrated.[1021] In markets with fifteen television stations, the average base DI is 595 and a newspaper/television duopoly/large radio group combination would increase the DI only 302 points.[1022] Similar results obtain in markets with twenty television stations.

[1016] *See* Appendix D (Diversity Index Scenarios).

[1017] *Id.*

[1018] *Id.*

[1019] *Id.*

[1020] *Id.*

[1021] *Id.*

[1022] *Id.*

479. This analysis is premised on the creation of very large combinations of media properties at the local level. Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits. Section 202(h) requires that we justify broadcast ownership limits on more than supposition or inchoate fears; our governing law requires that we target our structural limits at real and demonstrable harms. Based on the foregoing, we cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

480. The tiers adopted above – "at-risk" markets, "small to medium size" markets, and "large" markets – are derived from our DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. Our diversity concerns are greatest in at-risk markets and we have accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets we have imposed specific limitations on particular kinds of combinations that would, in our estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, our analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of our intra-service television and radio caps.

481. *Conclusion.* Although we generally prohibit television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and we limit newspaper-broadcast combinations in small to medium size markets, we recognize that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, we will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of

broadcast news available in the market.[1023] In addition, of course, we will review our entire local broadcast ownership framework, including our new cross-media limits, beginning next year, in our 2004 biennial review. We will not, however, permit collateral attack upon our rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules we adopt herein are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect our conclusions regarding the probable effects of given transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. As we stated above, the Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

D. Grandfathering and Transition Procedures

1. Grandfathering Provisions

482. *Existing Combinations.* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. Because the modified local TV rule permits increased common ownership of local TV stations, we expect few existing ownership combinations to

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[1023] As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver. At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

violate the rule adopted herein. However, some existing same-market combinations may not comply with the modified TV ownership rule because of the elimination of the Grade B overlap exclusion that is in the current rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.[1024]

483. As for radio, we are modifying the definition of many radio markets, replacing the existing signal-contour based definition with a geographic based market definition.[1025] This may result in a different number of stations being considered as participating in a local radio market. Because our radio ownership rule is based on a tiered system, if fewer stations comprise the radio market, and the market falls into a smaller tier, then the number of stations an entity may own would decrease. We also are attributing in-market radio JSAs, which could increase the number of radio stations that count toward an entity's numerical ownership limit.

484. We are persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations.[1026] As such, we will not require

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[1024] While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section.

[1025] We are retaining a modified contour-based definition outside of Arbitron markets until we have completed a rulemaking to define geographic radio markets in these areas. The grandfathering and transition procedures adopted herein apply to Arbitron and non-Arbitron areas. In areas not defined by Arbitron, through the completion of the rulemaking, licensees should apply the modified contour-based market definition for these purposes.

[1026] We requested comment on grandfathering issues in the Radio NPRMs: *Radio Market Definition NPRM*, 15 FCC Rcd at 25081-82 ¶ 11; *Local Radio*

entities to divest their current interests in stations in order to come into compliance with the new ownership rules.[1027] As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules.[1028] Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry.[1029] On

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Ownership NPRM, 16 FCC Rcd at 19888 ¶ 65.

[1027] Secret proposes that we grandfather general radio station ownership limits for markets rather than grandfathering specific ownership combinations. In the alternative, it proposes that we permit any broadcaster to own at least as many stations as the largest group owns presently in the specific market. Secret Comments in MM Docket No. 00-244 at 4. Secret's approach is administratively problematic, requiring the Commission to create and monitor a range of numerical limits in all of the Arbitron metros, as well as in non-Arbitron areas. Moreover, it would create disparate treatment in radio markets, not based on competitive analysis or public interest assessment, but based solely on existing combinations. Because these existing combinations were created using the current contour-based market definition, which we find does not promote our competition goals, some combinations may raise competition concerns and may violate the new rules. To allow additional groups to obtain the same numerical limits would only exacerbate such concerns.

[1028] *See, e.g.*, NAB Comments in MM Docket No. 01-317 at 50; WVRC Comments in MM Docket No. 01-317 at 35; Cumulus Comments in MM Docket No. 01-317 at 20; Eure Comments in MM Docket No. 01-317 at 5; HBC Comments in MM Docket No. 01-317 at 13, n.2; MBC Comments in MM Docket No. 01-317 at 11-12; Clear Channel Reply Comments in MM Docket No. 01-317 at n.5; MBC Reply Comments in MM Docket No. 01-317 at 4; Zimmer Comments in MM Docket No. 00-244 at 7; Weigle Comments in MM Docket No. 00-244 at 6; NAB Comments in MM Docket No. 00-244 at 29-30; Entercom Comments in MM Docket No. 00-244 at 7.

[1029] NAB Comments in MM Docket No. 01-317 at 50; MBC Reply Comments in MM Docket No. 01-317 at 4; Zimmer Comments in MM Docket No. 01-317 at 7-8; NAB Comments in MM Docket No. 00-244 at 29-30. We disagree with the commenters that support divestitures of current combinations. *See* Dick Broadcasting Comments in MM Docket No. 01-317

balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

485. While commenters overwhelming support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners - those that assembled combinations under the current rules - and disfavor those that cannot assemble competing combinations because of new ownership restrictions.[1030] Like all grandfathering decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. We do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations.

486. We expect that the issue of grandfathering existing combinations will affect predominately radio group owners because of the changes we make herein to the radio market definition. We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets. In those instances, parties may not be able to acquire the same number of stations as the largest owner in a particular market.[1031] However, those combinations were created based

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at 6-7; Idaho Wireless Comments in MM Docket No. 01-317 at 8; NABC Comments in MM Docket No. 01-317 at 17. The Commission has required divestitures of existing combinations pursuant to changes in media ownership rules in "egregious cases." *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1049.

[1030] NAB Comments in MM Docket No. 01-317 at 48; WVRC Comments in MM Docket No. 01-317 at 26; Blakeney Comments in MM Docket No. 01-317 at 2; Cox Comments in MM Docket No. 01-317 at 12; Daugherty Comments in MM Docket No. 01-317 at 4; Davis Comments in MM Docket No. 01-317 at 2; MBC Reply Comments in MM Docket No. 01-317 at 3; NABOB Reply Comments in MM Docket No. 01-317 at 8; Secret Comments in MM Docket No. 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 8, 9, n.15; Brill Comments in MM Docket No. 00-244 at 1; Aurora Comments in MM Docket No. 00-244 at 27; Great Scott Reply Comments in MM Docket No. 00-244 at 2.

[1031] At the same time, however, we believe that the impact on radio owners

upon the contour-based definition that we find herein fails to adequately address our competition goals in local radio markets. To allow additional broadcasters to obtain such combinations would disserve our goals. Our decision to grandfather existing combinations simply reflects the substantial equitable considerations discussed above, considerations that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases.

487. *Transferability.* We also asked for comments on whether to allow licensees to assign or to transfer control of grandfathered combinations that violate of the new ownership rules.[1032] In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits.[1033] Therefore, parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, as discussed earlier, in order to help promote diversity of ownership,[1034] we will allow sales of grandfathered combinations to and by certain "eligible entities." We do not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the

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will be mitigated because we are retaining, not decreasing, the current numerical caps, counting non-commercial stations as participants in the market, and counting any station licensed in the Arbitron market whether or not it meets Arbitron's minimum audience share requirements. In addition, a geographic based definition will allow for more regional consolidation of radio stations than our prior contour based approach.

[1032] *Definition of Radio Markets NPRM*, 15 FCC Rcd at 25081 ¶ 11; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19888 ¶ 65.

[1033] Likewise, modification of the facilities of a station in a grandfathered combination will be prohibited if the proposed modification would create a new violation of the ownership rules.

[1034] *See* Policy Goals, Section III(A)(5), *supra*.

combination complies with our adopted rules.[1035] As NABC, Idaho Wireless, and ARD suggest, such an approach would hinder our efforts to promote and ensure competitive markets.[1036] Grandfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition. Moreover, in the case of radio ownership, these combinations were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions. Unlike our decision not to require existing station owners to divest stations, here, the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations. Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. In addition, because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific

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[1035] Cumulus Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No. 00-244 at 5; Entercom Comments in MM Docket No. 00-244 at 7; Citadel Comments in MM Docket No. 00-244 at 12; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 00-244 at 29; Great Scott Reply Comments in MM Docket No. 00-244 at 3; Zimmer Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 01-317 at 50; Clear Channel Comments in MM Docket No. 01-317 at 26; MBC Comments in MM Docket No. 01-317 at 12.

[1036] NABC Comments in MM Docket No. 01-317 at 17; Idaho Wireless Comments in MM Docket No. 01-317 at 7; ARD Reply Comments in MM Docket No. 00-244 at 2.

complications due to joint operations.[1037] Therefore, we reject the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing, as some commenters suggest.[1038] Finally, requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent.[1039] In keeping with the policy we adopted in 1975, the prohibition on the transfer of grandfathered stations will not apply to *pro-forma* changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.[1040]

488. *Eligible Transfer.* We are adopting an exception to our prohibition on the transfer of grandfathered combinations in

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[1037] NAB Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No. 00-244 at 6; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 01-317 at 51.

[1038] NAB Comments in MM Docket No. 01-317 at 50-51; Clear Channel Comments in MM Docket No. 01-317 at 26, n.83; NAB Comments in MM Docket No. 00-244 at 9; Entercom Comments in MM Docket No. 00-244 at 8.

[1039] *See 1970 Multiple Ownership First Report and* Order, 22 F.C.C.2d at 323 ¶ 2; 1975 *Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1076 ¶ 103; *Local TV Ownership Report and Order*, 14 FCC Rcd at 12965 ¶ 146 (any transfer of permanently grandfathered television combinations after 2004 must meet the television duopoly rule or waiver policies in effect at the time of the transfer). Contrary to Clear Channel and NAB's assertions, our decision is consistent with the *1992 Radio Ownership Order*, *supra* note 96. NAB Comments in MM Docket No. 00-244 at 30; Clear Channel Comments in MM Docket No. 00-244 at 7. In the *1992 Radio Ownership Order*, we relaxed the ownership limits, permitting entities to own more stations in local markets based on numerical caps, and we also adopted an audience share cap, which precluded acquisitions of stations if the combined audience share at the time the application was filed exceeded 25%. At the time the rules went into effect, no entity owned more than the numerical caps or owned stations with a combined audience share exceeding 25%. Therefore, grandfathering existing combinations was not at issue.

[1040] *1975 Multiple Ownership Second Report and Order*, 50 FCC 2d at 1076 ¶ 103; *see also* 47 C.F.R. §§ 73.3555, note 4; 73.3540(f); 73.3541(b).

violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this *Order*, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this *Order*. Entities may transfer control of or assign a grandfathered combination to "eligible entities" as defined herein.[1041] In addition, "eligible entities" may sell existing grandfathered combinations without restriction. As we define in greater detail below, we limit "eligible entities" to small business entities, which often include businesses owned by women and minorities. We believe that facilitating new entry by and growth of small businesses in the broadcast industry will further our goals of promoting diversity of ownership as well as competition and localism.[1042]

489. We define an "eligible entity" as an entity that would qualify as a small business consistent with SBA standards for its industry grouping.[1043] For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue. For TV stations the limit is $12 million.[1044] In

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[1041] We are not grandfathering existing combinations of stations that exceed the ownership limits because of an attributable interest in a station pursuant to an LMA or JSA. Existing LMAs and JSAs that result in a combination of stations exceeding the ownership limits must be terminated at the time of the sale or within two years, whichever comes first.

[1042] MMTC suggests we define a category of "eligible purchasers" based on the eligibility standards set forth in S. 267 "Telecommunications Ownership Diversity Act of 2003." Because that pending legislation contemplates further definition of eligible purchasers by the Treasury Department after passage, we do not rely on its terms and therefore, set forth our criteria based on our judgment and the record of this proceeding.

[1043] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories). The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120.

[1044] To determine qualifications as a small business, SBA considers the

addition, to tailor this exception to meet our public interest objectives and ensure that the benefits of this proposal flow as intended, we will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Moreover, control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

490. In addition to the above, we will allow entities that meet the definition of "eligible entity" to transfer any existing grandfathered combination generally without restriction. We believe that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams. To prevent abuse of this policy, however, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this *Order* to an entity other than another eligible entity unless it has held the combination for a minimum of three years.[1045] Also, we will prohibit eligible entities from granting options to purchase, or rights of first refusal to prevent non-eligible entities from financing an

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revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. *See* 13 C.F.R. §§ 121.103, 121.105.

[1045] We do not intend to restrict pro forma transfers of grandfathered combinations or transfer of control to heirs or legatees by will or intestacy if no new ownership violation would occur.

acquisition in exchange for an option to purchase the combination at a later date. Finally, any transaction pursuant to this policy may not result in a new violation of the rules.

491. *Radio LMA Combinations.* As we discussed in the context of attributable JSAs in the Local Radio Ownership Section, there also may be instances in which an existing LMA may affect a licensee's compliance with the ownership limits adopted herein. As we stated in instances of attributable JSAs, because we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers, we will give licensees two years from the effective date of this *Order* to terminate any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this *Order*. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

492. *TV LMA Combinations.* In our *Local TV Ownership Report and Order*, we grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review. We do not alter this policy. These LMAs are not affected by the grandfathering policy adopted herein.

493. *TV Temporary Waivers.* A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this *Order* or the date on which the waiver expires, whichever is later, file one of the following: (i) a statement describing how ownership of the subject station

complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules.

494. *Cross-Media Conditional Waivers.* A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Although we are eliminating the current radio/television cross-ownership rules, we are adopting new cross-media limits. Parties that currently have conditional waivers for radio/television combinations must submit a statement to indicate whether the combination they hold (1) is located in an at-risk market, (2) is located in a small to medium size market, and (3) is in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, we will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, we will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, we will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered. On a case-by-case basis, we will consider the competition, diversity, equity, and public interest factors the combinations may raise.

495. *Other Cross-Media Waivers.* Our cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. We recognize, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases. For example, a television licensee assigned to a DMA to which only two other television stations are assigned (*i.e.*, an at-risk market) may request a waiver of the bar on its ownership of a daily newspaper

published within that DMA by demonstrating that the newspaper's community of publication neither receives television service from the station over-the-air nor through cable carriage.

2. Elimination of Flagging and Interim Policy

496. In August 1998, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition.[1046] Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[1047] Flagged transactions were subject to a further competition analysis, the scope of which is embodied in the interim policy we adopted in the *Local Radio Ownership NPRM*.

497. We believe that the changes we make today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions and to adopt the interim policy. By applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary prima facie showing that the transaction is contrary to the public interest.[1048] Accordingly,

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[1046] *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[1047] *See AMFM, Inc.*, 15 FCC Rcd at 16066 ¶ 7 n.10.

[1048] 47 U.S.C. § 309(d).

effective upon adoption of this *Order*, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the *Local Radio Ownership NPRM* in processing them.

3. Processing of Pending and New Assignment and Transfer of Control Applications.

498. The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this *Order*. These guidelines also cover pending and new modification applications that implicate our multiple ownership rules. Applications filed on or after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules, including, where applicable, the interim methodology for defining radio markets as adopted herein. The staff is directed to issue a Public Notice containing these guidelines contemporaneously with the adoption of this *Order*.

- *New Applications*. The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 ("New Applications"). We will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the *Order*. The freeze will be in effect starting with the *Order's* adoption date until notice has been published by the Commission in the *Federal Register* that OMB has approved the revised forms. Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining

radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. We will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

- *Pending Applications.* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the *Order* ("Pending Applications") may amend those Applications by submitting new multiple ownership showings to demonstrate compliance with the ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules.[1049] Parties may file such amendments once notice has been published by the Commission in the *Federal Register* that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules. Applications proposing *pro forma* assignments and transfers (FCC Form 316) will be processed in the normal course.

- *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption

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[1049] The Commission may determine that the nature of the amendment warrants a new public notice for the Pending Application.

date of the *Order* and that raise issues unrelated to competition against Pending Applications (as defined above) will be addressed with respect to those issues at the time we act on such Applications. Petitions and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that contest Pending Applications solely on grounds of competition pursuant to the interim policy[1050] will be dismissed as moot.

VII. NATIONAL OWNERSHIP RULES

499. In this section, we consider the national TV ownership rule and the dual network rule. We conclude that we should modify the former by raising the cap to 45%, and we retain the latter.

A. National TV Ownership Rule

500. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households.[1051] In the *Notice*, we sought comment on whether we should retain, eliminate, or modify this rule.[1052] We asked whether the current rule is necessary in the public interest as the result of

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[1050] *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[1051] Section 73.3555(e)(1) of the Commission's rules provides that "[n]o license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 73.3555(e)(1). Reach is determined by the number of television households in a DMA. 47 C.F.R. § 73.3555(e)(2).

[1052] *Notice*, 17 FCC Rcd at 18543-52 ¶¶ 126-55.

competition and whether it promotes the goals of competition, diversity, and localism.[1053] We also solicited comment on whether UHF television stations should continue to be attributed with only 50% of the television households in their DMA market or whether cable and DBS carriage of UHF signals eliminates the need for this "UHF discount."[1054] We conclude that the current rule cannot be justified and we raise the cap to 45%. We retain the UHF discount.

501. In the *1984 Multiple Ownership Report and Order*, we determined that repealing the national TV ownership rule would not harm competition or diversity.[1055] Consistent with our decision in 1984, we find that restricting national station ownership is not necessary to promote either of those policy objectives. We depart, however, from our 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism. The localism rationale for retaining the national television cap was articulated in our *1998 Biennial Review Report*. In that decision we explained that preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities.[1056] We continue to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that a broadcast network may reach

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[1053] *Id.* at 18544 ¶ 129.

[1054] *Id.* at 18544 ¶¶ 130-31. *See* 47 C.F.R. § 73.3555(e)(2)(i).

[1055] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 50-56 ¶¶ 86, 97-114 (repealing the station ownership restriction and instituting a six-year transitional ownership limitation of 12 stations). The Commission subsequently reversed its decision to repeal the rule. *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92 ¶¶ 33-40 (eliminating the sunset provision and adding a 25% cap on national audience reach, calculated as a percentage of all Arbitron ADI television households).

[1056] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶30.

through the stations it owns. Although the record supports retention of a national ownership cap, it does not support a cap of 35%. The evidence before us shows that the cap at the current level is not necessary to preserve the balance of bargaining power between networks and affiliates. The record also indicates that the cap appears to have other drawbacks. Most importantly, the cap restrains some of the largest group owners – broadcast networks – from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, we believe that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks. Balancing these competing interests, we raise the national cap from 35% to 45%.

1. Background

502. Since 1941, the Commission has limited the national ownership reach of television broadcast stations.[1057] The Commission has modified the restriction several times to keep pace with the changing marketplace.[1058] In 1984, the Commission repealed the rule, concluding that it was not necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of twelve television stations nationwide.[1059] On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset

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[1057] *Notice*, 17 FCC Rcd at 18543 ¶ 127.

[1058] *See Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three television stations); *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 Fed. Reg. 5442 (May 23, 1944) (raising the ownership limit from three to five stations); *Amendment of Multiple Ownership Rules*, 43 F.C.C. 2797, 2801-02 ¶ 14 (1954) (raising the ownership limit from five to seven stations).

[1059] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 54-56 ¶¶ 86, 108-114.

provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry.[1060] The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.[1061]

503. In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide.[1062] The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations.[1063] In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35%.[1064] The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions.[1065] In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.[1066]

[1060] *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92, 97 ¶¶ 33-40, 52.

[1061] *Id.*

[1062] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374 (1996).

[1063] *1998 Biennial Review Report*, 15 FCC Rcd at 11072-75 ¶¶ 25-30.

[1064] *Id.* at 11072-74 ¶¶ 25-29.

[1065] *Id.* at 11074-75 ¶ 30.

[1066] *Id.* at 11073 ¶ 26 n.78.

504. Several broadcast networks challenged the Commission's decision to retain the national TV ownership rule. In *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration.[1067] The court rejected the Commission's "wait-and-see" approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest.[1068] The court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

505. With respect to competition, in its *1998 Biennial Review Report*, the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations and increased their audience reach since the 1996 Act's passage.[1069] The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule.[1070] The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets.[1071] The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the

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[1067] 280 F.3d 1027.

[1068] *Id.* at 1042.

[1069] *Id.* at 1041-42 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 27).

[1070] *Id.* at 1042.

[1071] *Id.* (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78).

requirement under Section 202(h) to show that the rule is necessary in the public interest as the result of competition.[1072]

506. The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under Section 202(h) if it served either interest.[1073] The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served.[1074] The court noted that the Commission, in its *1998 Biennial Review Report*, "mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point."[1075] The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the Commission concluded that the national TV ownership restriction should be phased out after six years because: (1) the rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity.[1076] In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or

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[1072] *Id.* at 1044.

[1073] *Id.* at 1042.

[1074] *Id.* at 1042-43.

[1075] *Id.* at 1042 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78).

[1076] *Id.* at 1034, 1042-45. *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 27, 30-31, 37 ¶¶ 31-33, 43, 60.

spent proportionately more revenue on local programming.[1077] However, the court acknowledged the Commission's right to reverse course, provided the reversal is supported by a reasoned analysis.[1078] Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate remedy was to remand, rather than to vacate, the rule.[1079] We now consider whether the current rule can be justified as necessary to promote competition, diversity or localism.

2. The Current National TV Ownership Rule Cannot Be Justified

507. Under Section 202(h), we must evaluate whether the national TV ownership rule continues to be "necessary in the public interest as the result of competition."[1080] To make this determination, we consider whether the rule serves the public interest by furthering our policy goals of competition, localism, or diversity. The evidence demonstrates that a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities. However, the evidence also demonstrates that the current cap of 35% is not necessary to preserve that balance.

a. Competition

508. In analyzing whether the current rule is necessary to protect competition, we focus on whether and to what extent market power exists in any relevant market, and what effect the rule has on the existence and exercise of this market power. In the 1984 decision to eliminate the national ownership cap, the

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[1077] *Fox Television*, 280 F.3d at 1043 (citing *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 35 ¶ 53).

[1078] *Id.* at 1044-45.

[1079] *Id.* at 1048-49.

[1080] 1996 Act, § 202(h).

Commission limited its competition analysis to the national television advertising market.[1081] In this decision, we expand our competition review to include the national program acquisition market. The national cap affects economic concentration in national markets by limiting the size of group owners of television stations, but does not affect concentration in the local video delivery market, and thus does not raise competition concerns that were discussed in the local ownership rule sections above. The national cap limits the ability of group owners to purchase television stations in individual local markets. The effect of this ownership restriction on station performance in the video delivery market is discussed in the localism section below.

509. Based on our analysis of the relevant markets, we find that the current rule is not necessary to maintain competition in the three economic markets we examine. As the record before us indicates, the media marketplace is undergoing unprecedented change. Broadcast stations are subject to competition from cable and DBS,[1082] and they face increased competition for viewers, advertising revenues, station network affiliations, and programming.[1083] We conclude that the 35% cap is no longer necessary to protect competition in the media marketplace and unnecessarily constrains the organization of, and investment in, free, over-the-air (*i.e.*, non-subscription) broadcast television.

510. *Broadcast competition framework.* The evolution of non-price competition in television has implications for the economic organization of broadcast television networks. Higher channel capacity cable systems and the growth in the

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[1081] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 39-40 ¶¶ 67-71.

[1082] *See* Modern Media Marketplace, *supra* Section IV.

[1083] Paxson notes that broadcasters face competition today from "a dizzying array of diverse and high quality entertainment and news choices." Paxson Comments at 11.

number of cable networks, together with the programming options offered by DBS, have intensified the competitive pressure on broadcast television networks to slow the erosion of viewer market share and to build strong network brand identity reflecting program focus, quality and reputation.[1084]

511. Two broadcast television network organizational changes, which are viewed as responses to the growth in viewer options, are noteworthy, namely, (1) the extensive backward integration into program supply, and (2) the desire to increase the extent of forward vertical integration through ownership of additional local television stations. Transaction cost economics suggests that such organizational integration induced by increased rivalry within the media industry may improve economic efficiency.

512. Transaction cost economics adopts a contractual approach in understanding the economic organization of firms.[1085] The transaction—the exchange of goods or services for money or other goods between parties—is the focal point of economic analysis. Determining the governance structure that minimizes the economic cost of effectuating a particular type of transaction is a central objective of a transaction cost analysis. Transaction cost economics identifies three, discrete governance structures, namely, (1) the market; (2) hybrid contracting; and (3) hierarchy, where transactions are placed under unified ownership in a firm subject to administrative controls and management.[1086] Whether it is economically

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[1084] Reputation may constitute a mobility barrier that helps deflect continuing market share erosion in the mass audience strategic group. An empirical study of the relationship between reputation and strategic groups in the insurance industry is provided by T. D. Ferguson, D. L. Deephouse, and W. L. Ferguson, *Do Strategic Groups Differ in Reputation?*, 21 STRATEGIC MGMT J. 1195, 1195-1214 (2000).

[1085] Oliver E. Williamson, THE MECHANISMS OF GOVERNANCE 54 (Oxford Univ. Press 1999).

[1086] *Id.* at 378.

efficient (cost minimizing) to effectuate exchange using market contracting or through hierarchy (vertical integration) depends on certain behavioral assumptions, and key attributes of any given transaction.[1087]

513. In general, ordinary market contracting is an efficient governance structure for transactions supported by general purpose assets not dedicated to the specific output demand of a given customer. As asset specificity deepens, market contracting as a governance structure gives way to either hybrid structures or hierarchy (vertical integration) as the least costly to organize transactions.[1088] The pervasiveness of asset

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[1087] From a transaction cost perspective, transactions differ one from another in three important dimensions, namely, (1) the frequency of a given type of transaction; (2) the degree and type of uncertainty implied by the transaction; and (3) the condition of asset specificity. While all three dimensions are important in determining the least costly governance structure for organizing transactions, the condition of asset specificity is especially important. Asset specificity refers to the degree that an asset can be redeployed to alternative uses and by alternative users without a substantial loss in productive value. Asset specificity is similar to the concept of *sunk cost* as found in the literature on the theory of contestable markets and recent game-theoretic models of industry structure and performance. Asset specificity is a somewhat broader concept than sunk cost, however, and its full significance is apparent only within the context of incomplete contracting. Transaction cost economics recognize that asset specificity can take many different forms including, but not limited to, site specificity; physical asset specificity; human asset specificity derived from learning-by-doing; and dedicated assets, representing discrete investments in general purpose plant or facilities for meeting the demand for output for a specific customer. *See* Williamson, *supra* note 1088 at 50.

[1088] The condition of asset specificity, if pervasive, poses substantial contracting hazards such that ordinary market exchange as encountered in competitive markets may be impaired or even effectively blocked. In other words, the transaction cost of operating a market mechanism as a governance structure in the presence of deep asset specificity may be so high that a market will simply fail. Thus, market failure may be attributable not only to various externalities but to excessive transaction costs as well. This insight is attributed to Kenneth Arrow, according to Williamson. *See* Oliver E. Williamson, THE ECONOMIC INSTITUTIONS OF CAPITALISM 19 n.8 (1985).

specificity in the program production industry suggests that complex contracts between broadcast television networks and program suppliers may not be the least costly governance structure for effectuating transactions.

514. Broadcast television networks have a single, strategic focus, namely, the maximization of the number of television viewers that are attracted to mass audience and niche audience programming.[1089] This strategic focus is crucial to broadcast television networks, since the sale of audiences to national advertisers provides their only stream of revenue from broadcast operations in contrast to cable networks which may receive both advertiser and subscriber revenue.[1090] By contrast, local broadcast television stations pursue a more complex business strategy as licensed broadcast facilities. First, the local station seeks to maximize the size of its audience it attracts within its local television market. If the local station is a network affiliate, then the local station will promote the network's program schedule together with syndicated programming the station may acquire to help fill out its daily program schedule. Second, the local station will also promote its own locally-produced programming, such as news and public affairs programming, that it believes is responsive to issues or viewer preferences in the communities served by the station. Station management may vary the allocation of time

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[1089] Roughly speaking, broadcast television revenues tend to be proportional to audience size. Assuming that marginal operating cost is small relative to the fixed cost of operating a broadcast television network and generally invariant with respect to changes in audience size, then maximizing audience size is roughly equivalent to maximizing profit.

[1090] In most cases, broadcast television networks today are organizational units of larger media enterprises, *e.g.*, ABC is one of numerous business units operated by the Disney corporation, that have numerous revenue streams. Corporate management ordinarily expects, however, that each business unit will recover its unit-specific fixed and variable costs, contribute to the cost of shared corporate services and functions, and earn unit-specific profit.

devoted to any particular type of programming, including network programming, to respond to emerging preferences or news events in the communities located in its local television market.

515. As the networks have lost viewer market share over the last decade in response to the growth in cable and DBS, the traditional contractual relationship between a television network and a local station affiliate may be a less efficient governance structure. From a transaction cost perspective, television networks view their massive sunk investments in network programming as increasingly risky assets as non-broadcast program options proliferate.

516. With respect to contractual safeguards, the networks have attempted to negotiate substantial penalties for failure to clear a full schedule of network programming. With respect to changes in governance structure, the broadcast television networks have argued for elimination of the national ownership cap, which would permit the networks to substitute hierarchy (vertical integration) for the current contractual relationship with independently-owned station affiliates. Presumably, the networks believe, consistent with transaction cost logic, that conflicts in strategic focus between stations and the network respecting programming decisions can be resolved more efficiently, *i.e.*, at minimal transaction cost, if hierarchy, *i.e.*, forward vertical integration, replaces market contracting as the governance structure.

517. Thus, our transaction cost analysis suggests that our national ownership cap probably restricts the full transition to the least costly way for organizing transactions between television networks and local television stations, *i.e.*, forward vertical integration, *assuming* that realization of a network's singular strategic focus on mass or niche audience size is the preferred policy objective. If, however, locally produced programming and ultimate program selection authority are a higher policy priority, then our transaction cost economic

framework identifies the relevant policy trade-off, namely, the incremental social benefit of local programming viewed as a component of our localism policy goal versus the increased social and private costs of inefficient contracting.

518. *Program Production and Acquisition Market.* Competition in the program production and acquisition market is important because networks and owners of individual television stations compete with each other, as well as with cable television networks, to acquire programming that will continue to attract viewers to their channels. Although television station owners as a group are relatively significant purchasers of programming, we have no evidence that they exercise market power in the program production market.[1091]

519. In considering the effect of the national television cap on competition in the program acquisition market, we first must identify the market participants. The broadcast networks contend that the following categories of firms compete in the program acquisition market: broadcast television networks, individual television stations (and group owners thereof), non-broadcast program networks (*i.e.* cable networks), syndicators, pay-per-view systems, VHS and DVD rental stores.[1092] NASA counters that major broadcast networks are a discrete sub-market, or "strategic group," within the program purchasing market.[1093] We generally agree with the networks' definition of the relevant market participants, although we exclude video sales and rental stores. We disagree with the networks' contention that such outlets are clearly a substitute for the delivered video programming of broadcast channels and cable channels. Those channels are the most conventional form of television viewing that can be substituted among by viewers

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[1091] *See* Miscellaneous Requests, Independent Producers *infra* Section VIII(D).

[1092] Fox Comments, Economic Study E.

[1093] NAB/NASA Reply Comments at 57.

almost instantly. It is possible to analyze the impact on the program acquisition market of relaxing the national television ownership cap by examining company expenditure shares. The following describes estimates of expenditure shares and calculation of a hypothetical HHI. The analysis assumes that the buyers in this market are broadcast networks, broadcast stations, and cable networks.[1094] OPP Working Paper 37 (Table 32) provides estimates for the year 2000 of programming expenditures by the Big Four commercial networks and by television stations.[1095]

520. The table below provides program expenditure data for the year 2000 for the Big Four broadcast networks in column 2 and for eight firms that own cable networks in column 4. The eight firms include the top four broadcast networks, the two biggest cable network owners that do not own television stations, and the two companies with the biggest cable network shares that also own television stations. There is also a residual category that includes all other cable network expenditures as "Other."

521. Column 3 includes some hypothetical broadcast station owner shares. We do not know exactly how station

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[1094] Our market definition includes pay cable networks as well as pay-per-view networks, but in the absence of data, they are excluded from this analysis.

[1095] The network figure is based on gross advertising revenue data from the Television Bureau of Advertising, FCC data on net advertising as a percentage of gross, and a trade press estimate of network programming expenditures as a percentage of net advertising revenues. This yields a total figure for the top four networks rather than estimates for each network. This analysis assumes that the networks each spend the same amount, which we believe is a reasonable approximation although Fox probably spends less than the other three. The television station estimate is based on data in the NAB Television Financial Report. The cable programming network figures come from Kagan World Media publications, ECONOMICS OF BASIC CABLE NETWORKS (2002) at 432-433 and CABLE PROGRAM INVESTOR (Jan. 17, 2003) at 6. Data are available for 65 basic cable networks and for the HBO, Showtime, and Starz premium channels.

expenditures are divided up among companies that own television stations. The numbers in this column represent a "worst case scenario" of what could happen if the national television cap were eliminated. In 2000 there were 1248 commercial television stations on the air. We know that the major commercial networks each reach virtually 100% of US television households and that each network has roughly 200 affiliated stations.[1096] If stations were distributed evenly across markets, then there would be room for six television station companies each reaching all US television households.

522. However, stations are not evenly distributed across markets. There are 50 Nielsen DMAs with fewer than four commercial stations, but they account for only 4.6% of US television households, so, from the point of view of station programming expenditures, it is reasonable to assume that each of the top four broadcast networks could achieve 100% coverage of US television households. However, there are 120 markets with fewer than six commercial television stations, and those markets account for 19.7% of US television households. So it is reasonable to assume that two additional station groups could grow to 80% coverage. This analysis assumes that television station program expenditures are divided among six firms: the four networks with 100% coverage, and Cox and Hearst, each with 80% coverage. We assume that expenditures are proportionate to coverage. The resulting expenditure estimates are in column 3. These estimates reflect a level of concentration that is higher than the true level. There are 63 markets with more than six commercial stations in them. Adding up the excess over six stations in each market yields a total of 259 stations. We know that a single company can own multiple stations in the same market, but it is likely that even with more companies owning two stations in a market that there will still be more than six station owners in some markets.

[1096] There are 210 Nielsen DMA markets, and in a few cases a network has more than one affiliate per market.

523. Column 5 contains hypothetical total programming expenditures for the eight firms, aggregating across broadcast network, broadcast station, and cable network categories, and using the hypothetical consolidated television station ownership pattern described above. Column 6 shows market shares and column 7 implements the HHI calculation by squaring and summing the market shares. The resulting "worst case" HHI of 1535 is in the moderately concentrated range. Even with the highly unrealistic assumption of a 100% national reach by four companies, and an 80% reach by two companies, these levels of market share provide us with no basis to conclude that the current 35% cap on national television ownership is needed to protect competition in the program acquisition market.

Hypothetical HHI for Program Acquisition (data are year 2000 in millions of $)

	Broadcast Network	Broadcast Station	Cable Network	Total	Market Share	Market Share Squared
Cox	0	969.5	139.4	1108.9	4.37	19.13502
Hearst	0	969.5	530	1499.5	5.92	34.98944
ABC	2581.75	1212	1276.7	5070.45	20.00	400.071
Fox	2581.75	1212	521.8	4315.55	17.02	289.812
GE	2581.75	1212	300	4093.75	16.15	260.7875
Viacom	2581.75	1212	1466.4	5260.15	20.75	430.5666
Time Warner	0	0	2162.9	2162.9	8.53	72.79758
Liberty Media	0	0	786.3	786.3	3.10	9.621009
Other	0	0	1052.5	1052.5	4.15	17.23806
Total	10327	6787	8236	25350	100.00	1535.018

524. *National Advertising Market.* The Commission's focus is not on advertisers, but on the ability of broadcasters to compete for advertising revenues. Broadcast networks compete for advertising dollars by creating national audiences for their programming. If the networks cannot generate national

audiences, their ability to compete for advertising revenues will decline, thereby diminishing their ability to invest in innovative programming. As a result, viewers will experience a decrease in programming choices and quality.

525. In its 1984 decision, the Commission determined that elimination of the national cap would not harm competition in the national advertising market.[1097] The Commission found that the number of firms in the market would ensure continued vigorous competition in that market. In the *Notice*, we sought information on whether our conclusion in 1984 continues to be valid. To analyze competition in this market, we sought comment on the firms that compete in the national television advertising market, including the extent to which national spot advertisements and/or syndicated programming are fungible with network television advertising from the perspective of advertisers.[1098] The national television advertising market brings together those advertisers wishing to reach a national audience with television networks that provide national exposure. Broadcast television networks are the leading suppliers of national television advertising.

526. NAB/NASA claims the record demonstrates that national spot advertising is competitive with national advertising.[1099] National advertisers can purchase advertising on a collection of local television stations that can approximate

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[1097] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 52 ¶102.

[1098] National spot advertising time is sold by stations to national advertisers, which aggregate national or regional coverage by purchasing advertising spots from stations in multiple markets. Syndication refers to advertisements sold in syndicated programs. *See* OPP Working Paper 37 at 11.

[1099] *See* B.D. McCullough & Tracy Waldon, *The Substitutability of Network and National Spot Television Advertising*, 37 Q. J. BUS. & ECON 3 (Spring 1998) (*"Network Substitutability"*) (concluding that the estimated elasticities suggest that the network and national spot advertisements have been, and continue to be, good substitutes in the aggregate). *But see* Silk, Klein, and Berndt, *supra* note 522 at 323-48 (eight national media classes are not viewed as substitutes by national advertisers).

a national advertisement on a single network. Local television stations sell national spot advertising through advertising agencies, which aggregate the available advertising on local stations for national spot buyers. NAB/NASA contends that when demand for national advertising on a particular network show exceeds the available supply of national network advertising time, advertisers turn to the national spot advertising market to reach viewers.[1100] Television stations rely in part on the national spot advertising market for a portion of their advertising revenue. NAB/NASA argues that if the ownership cap is raised, the broadcast networks will increase their ownership of television stations and decrease the national spot availabilities to such an extent that the viability of the national spot market will be impaired.[1101] Specifically, NAB/NASA contends that a network-owned station will not compete against its network for national (spot) advertising revenue. The result, according to NAB/NASA, is that competition in the national advertising market will be diminished by the decreased viability of national spot advertising as a substitute for network advertising. NAB/NASA asserts that the resulting loss of revenue to local stations will harm their ability to compete with other delivered video providers.[1102]

527. *Discussion.* We agree that a strong national spot advertisement market is an important component of the financial stability and competitiveness of television station owners. We find, however, that the increase in the cap from 25% to 35% has not harmed national spot advertising revenues. Our analysis of advertising revenue data indicates that despite increases in ownership of stations by CBS, NBC and Fox since 1996, there has been no diminution in the national spot advertising market that can be reliably associated with an

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[1100] NAB/NASA Comments at 59.

[1101] *Id.* at 61-62.

[1102] *Id.*

increase in network station ownership. With the exception of 2001, national spot advertising has experienced a relatively consistent growth.[1103]

528. Although we agree with NAB/NASA that network-owned stations have less incentive to compete directly with an affiliated broadcast network in the national advertising markets, we cannot agree that such competition in fact would not occur. If national advertisers are willing to pay a higher per-spot price to network-owned stations than are local advertisers, network-owned stations might well accept the higher priced advertising. Thus, the profit-maximizing behavior of the network-owned stations might well serve as a substitute for national advertisers seeking to purchase national spot advertising. Such a response by network-owned stations would maintain the viability of national spot advertising as an option for national advertising regardless of the level of the national television cap. Moreover, even if the top four networks were to acquire additional local stations and declined to use the national spot advertising availabilities to compete with their own network's advertising availabilities, there is every reason to think the network-owned stations would seek to take national advertising dollars away from *other* broadcast networks. That is, even if an NBC-owned station sought not to compete with the NBC network for advertising dollars, the NBC-owned stations have incentives to compete in the national spot market for advertising dollars that might otherwise go to the CBS, ABC, and Fox networks. Consequently, we cannot say that the national cap is necessary to protect competition in the national advertising market.

[1103] Since 1996, the broadcast networks have increased the number of owned and operated stations, yet the national spot advertising volume has risen from $9.1 billion in 1995 to $12.2 billion in 2000. From 1990-1994, the compound annual growth rate (CAGR) in the national spot advertising market was approximately 4.9% as compared to the CAGR for 1995-2000 of approximately 6.1%. *See* OPP Working Paper 37 at 13. *See also* Richard Billotti, *The Case for Moderate Growth in TV Advertising*, EQUITY RESEARCH (Jan. 3, 2003).

529. *Innovation.* In the *Notice*, we asked whether the national ownership cap promotes or hinders innovation in the media marketplace.[1104] Affiliates argue that non-network owners encourage innovation because affiliates provide a competitive outlet for innovative programming. NAB/NASA provides nine examples of innovation by non-network group owners, such as satellite newsgathering encouraged by affiliates to improve upon network-delivered news; the development of the local newsmagazine format; all-news cable channels developed for cable carriage; digital TV experiments such as the multicasting by several affiliates of the NCAA tournament; the delivery of local news in HDTV format; and the creation of iBlast, a joint venture between affiliates and an outside firm to develop new uses for digital spectrum.[1105]

530. Taking an opposing view, Fox contends that the cap limits networks' investment in innovative programming by "inhibiting economic efficiencies" that come with a larger number of owned and operated stations. As evidence, Fox refers to a study by Michael Katz which concluded that, by inhibiting the potential economic efficiencies available to group owners, the rule artificially raises the cost of operating television stations and limits the return that group owners can realize on their programming investments.[1106] Katz argues that the rule drives group owners to direct more of their resources away from free television and toward alternative means of distributing programming content, such as subscription-based cable channels.[1107]

531. *Discussion.* The current national ownership cap appears to encourage innovation in broadcast television by preserving a number of separately-owned station groups, including non-

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[1104] *Notice*, 17 FCC Rcd at 18549-50 ¶ 146.

[1105] *See* NAB/NASA Reply Comments at 23-27.

[1106] Fox Comments at 43; Katz, *supra* note 66.

[1107] Katz, *supra* note 66 at 48-51.

network owned station groups. The current number of station group owners has led to innovation in ways that benefit the public. Those developments include the creation of local all-news channels in partnership with local cable companies, the implementation of program formats such as local newsmagazines, and, importantly, experimentation with the spectrum allocated to local broadcasters for digital television.[1108]

532. The transition to digital television represents a critical evolutionary step in broadcast television. We are committed to ensuring the rapid completion of that transition in a way that delivers the greatest possible benefits to the viewing public. We believe that the broadcast industry is more likely to rapidly address the technical and marketplace issues associated with digital television if there are a variety of group owners exploring ways to use the spectrum. The record shows that non-network owners of television stations are actively exploring different ways of using digital spectrum. It is also important to have group owners with potentially different economic incentives in this area examining transition mechanisms to digital television. Because of networks' ongoing investment in programming, it is possible that networks may have incentives to use digital spectrum differently from affiliates. The Fox television network, for instance, has indicated its interest in using the spectrum of its owned stations as well as its affiliates for future services.[1109] Therefore, we conclude that a national television cap is necessary to preserve a number of separately-owned television station groups, including non-network groups, that will increase the types of digital transition experiments and ultimately facilitate a rapid and efficient transition to digital broadcast television.

[1108] NAB/NASA Reply Comments at 57-58.

[1109] NAB/NASA Comments at 42.

b. Diversity

533. The *1984 Multiple Ownership Report and Order* concluded that the local community is the relevant market for evaluating viewpoint diversity and that, therefore, the national TV ownership rule is not needed to promote viewpoint diversity.[1110] The *1984 Multiple Ownership Report and Order* also stated that the national market is not relevant for evaluating viewpoint diversity, but even if it were, the proliferation of media outlets renders the national ownership restrictions unnecessary.[1111] In the *1998 Biennial Review Report*, the Commission did not analyze the rule's effects on viewpoint diversity and merely stated, without evidentiary support, that the rule promotes diversity of programming.[1112] In remanding the national TV ownership rule, the court in *Fox Television* found that the Commission had failed to support its 1998 conclusion that the rule is necessary to strengthen affiliates' bargaining power and had neglected to address its 1984 determination that the national market is not the relevant geographic area to consider when evaluating diversity.[1113] We address the issue of affiliates' bargaining power in the following section and address diversity here.

534. In the *Notice*, we observed that the national TV ownership rule does not appear to be relevant to the goal of promoting viewpoint diversity because people gather news and information from sources available in their local market and that the relevant geographic market for viewpoint sources is local, not national.[1114] We also noted that the viewpoints aired by television stations in one city do not seem to have a

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[1110] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 27 ¶¶ 31-32.

[1111] *Id.* at 27-31 ¶¶ 33-43.

[1112] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30.

[1113] *Fox Television*, 280 F.3d at 1042-43.

[1114] *Notice*, 17 FCC Rcd at 18546 ¶136.

meaningful impact on the viewpoints available in other cities.[1115] Commenters do not provide evidence that persuades us to alter those views, and we affirm our 1984 conclusion that the national TV ownership rule is not necessary to promote diversity.

535. *Discussion.* We conclude that the national television cap is not necessary to promote viewpoint diversity. Americans use media outlets available in their local communities as sources of information. The national television cap, by contrast, ensures a larger total number of station owners *nationwide*, but it has no meaningful impact on viewpoint diversity within local markets.[1116] Therefore, we affirm our 1984 decision that the national television ownership limit is not necessary to promote viewpoint diversity.[1117] We also affirm our decision that the market for viewpoint diversity is local, not national. And we reiterate our 1984 statement that even if the national market were the relevant area to consider, the proliferation of media outlets nationwide renders the current rule unnecessary.[1118]

[1115] *Id.*

[1116] It is possible, of course, that the replacement of one station owner by another could in fact reduce the number of independently-owned television stations in that market. If the acquiring firm already owned one station in that market and the seller was selling its only station in that market, there would be one less independently-owned station in that market. The impact of such a transaction on viewpoint diversity would be accounted for under the diversity component of our local rules.

[1117] *See* Fox Comments at 34-35. We are not persuaded by claims to the contrary. *See* UCC Comments at 49-50, 53-54; Cox Comments at 65; IPI Comments at 63; AFTRA Comments at ¶ 123; CCC Comments at 22.

[1118] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 25, 27 ¶¶ 24, 33. *See also* Modern Media Marketplace, *supra* Section IV; Fox Comments at 10-26; Paxson Comments at 9-11; Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 2, 2003) ("Fox May 2, 2003 Ex Parte"), Attachment A at 18. *But see* Cox Reply Comments at 18-22 (growth of other media outlets does not negate the need for the 35% cap).

536. Although proponents of the current rule assert that the increased uniformity imposed by the networks' national distribution agenda limits the number of viewpoints available to the public,[1119] we do not find convincing evidence in the record indicating that raising the current national TV ownership limit would harm viewpoint diversity. Professors Schwartz and Vincent assert that maintaining a diversity of ownership across local markets is beneficial because viewers may become aware of investigative news stories presented by stations in other markets, particularly those of strong stations.[1120] NAB/NASA argues that "this type of cross-fertilization is less likely to occur in the absence of the national TV ownership rule."[1121] For this cross-fertilization to be a plausible scenario, the following minimum conditions must occur: (1) the national cap prevents a station from being acquired by a broadcast network; (2) the non-acquired station produces content that by some measure is meaningfully different (and significant from a viewpoint perspective) from what the network-owned station would have aired; and (3) the airing of that different content becomes known to consumers in other localities. The national cap cannot be justified by reference to such a hypothetical scenario as this.

537. Commenters discussing types of diversity other than viewpoint diversity do not provide an evidentiary basis for retaining the current cap.[1122] The *1998 Biennial Review Report*

[1119] NAB/NASA Comments at 12; NAB/NASA Reply Comments at 6; Cox Comments at 26-31.

[1120] NAB/NASA Comments, Attachment 1, Marius Schwartz & Daniel R. Vincent, *The Television National Ownership Cap and Localism* ("NAB/NASA Comments, Schwartz/Vincent Paper") at 12-13. *See also* NAB/NASA Comments at 12, 69-70; Cox Reply Comments at 12-13.

[1121] NAB/NASA Comments at 69.

[1122] Cox briefly discusses program, source and outlet diversity, but it does not provide evidentiary support for its arguments. Cox Comments at 65-66. CPD fails to explain how repealing the 35% cap would diminish program and source diversity in prime time programming. *See* CPD Comments at 3-

stated that "[i]ndependent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming."[1123] In this *Report and Order*, however, we have concluded that we can and should rely on the marketplace, rather than regulation, to foster program diversity.[1124] Further, the record in this proceeding does not contain evidence that affiliates air programming that is more diverse than programming aired by network-owned stations. Therefore, we cannot affirm our earlier determination regarding program diversity, and we do not find that the cap is necessary to foster program diversity.

c. Localism

538. *Introduction.* The Commission's decision in the *1984 Multiple Ownership Report and Order* did not address whether the national TV ownership rule advances its goal of localism.[1125] In the *1998 Biennial Review Report*, however, the Commission did address its localism goal, declining to modify the national TV ownership restriction in part because affiliates "play a valuable counterbalancing role" to network programming decisions by exercising their independent programming discretion regarding what programs best serve the needs and interests of their local communities.[1126] In *Fox Television*, the court stated that, although the Commission had failed to present evidence that the cap in fact promoted localism, localism was a legitimate basis for imposing a national ownership cap.[1127]

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[1123] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30.

[1124] *See* Policy Goals, *supra* Section III.

[1125] *See 1984 Multiple Ownership Report and Order.*

[1126] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶ 30.

[1127] "[T]he public interest has historically embraced diversity (as well as localism) . . . and nothing in § 202(h) signals a departure from that historic scope." *Fox Television*, 280 F.3d at 1042.

539. Based on our analysis of the extensive record in this proceeding, we conclude that a national television ownership limit is necessary to promote localism on broadcast television. The evidence suggests, however, that the current 35% cap is not needed the protect localism, and may in fact be hindering public benefits that are expected to follow from an increase in the cap. We conclude that a national cap of 45% fairly balances the competing public interest values affected by this rule. We recognize that our decision to retain a national ownership cap is contrary to our conclusion in 1984. We reach this different conclusion principally because we find that a cap is necessary to protect localism by preserving a balance of power between networks and affiliates, a policy objective that was not considered in the 1984 decision. In this section, we detail the localism analysis. Thereafter, we discuss our modified rule.

(i) Whether a National Cap Promotes Localism

540. In this section we examine the effect of a national television cap on the economic incentives for locally responsive programming by television stations. We also consider evidence that a national cap results in behavior by network-affiliated stations that is responsive to the needs and tastes of a station's local community.[1128]

[1128] Cox argues that allowing networks to significantly expand their station ownership will increase the networks' ability to pressure cable operators, and erode the cable operators' bargaining position, during retransmission consent negotiations. Cox Comments at 41-47; Letter from Alexander V. Netchvolodoff, Senior Vice President of Public Policy, Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 3, 2003) at 1-2. *See also* American Cable Association Petition for Inquiry into Retransmission Consent Practices (filed Oct. 1, 2002); Children Now Comments at 13-15. Fox responds that the negotiations are not affected by the number of stations owned by a network, but by each party's market-by-market evaluation of whether the agreement is beneficial. Letter from John C. Quale, Counsel for Fox, to Marlene H. Dortch, Secretary, FCC (April 21, 2003) ("Fox April 21, 2003 Ex Parte") at 2. Cox's arguments are outside the scope of our biennial review.

(a) Economic Incentives for Localism

541. NAB/NASA contends that the current national cap is needed to preserve affiliates' bargaining power with their networks.[1129] NAB/NASA explains that limiting the national audience that networks can reach through their owned stations promotes a balance of power between networks and their affiliates. NAB/NASA also claims that the cap is necessary to counteract the networks' strong financial incentive to promote the widest distribution across the nation of network programming irrespective of the tastes of one or more particular local cities. The widest possible distribution of programming, according to NAB/NASA, increases viewership of network programming, which maximizes network advertising revenues. According to NAB/NASA, maximum national exposure of programming also improves the likelihood that the program owner will realize additional revenues in the program syndication market. NAB/NASA contends that as broadcast networks have ownership stakes in a larger percentage of their prime time programming, their incentive to create programs with syndication value -- and their incentive to stifle local preemption -- increases.[1130]

542. NAB/NASA argues that the incentive of independently-owned affiliates, in contrast to network-owned stations, is to make programming decisions that are more closely aligned with the needs and tastes of their communities of license.[1131] A network derives its income from the programming that the network produces (and the syndication revenue the programs might generate) as well as from its local stations. A local station maximizes its income by providing programming desired by its local community irrespective of national

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[1129] NAB/NASA Comments at 9.

[1130] *Id.* at 33.

[1131] *Id.* at 10.

programming preferences. Therefore, the programming interests are not always the same.

(b) Evidence of Localism by Affiliates

543. NAB/NASA contends that the national cap is needed to preserve a body of network affiliates not owned by the network that can influence network programming so that it is more suited to the tastes and needs of the affiliates' communities.[1132] In support of this argument, NAB/NASA submitted several examples of the influence independent affiliates can have on network programming:

- When NBC aired a special edition of *Fear Factor*, featuring Playboy bunnies, during halftime of the Superbowl (airing on Fox), affiliates objected to the network promos, which ran during all hours of the day, and included tag lines such as "who needs football when we've got bunnies?"

- NAB/NASA states that when NBC began a trial program to accept liquor advertisements, so many affiliates opted out of airing the ads due to local concerns that NBC dropped the program.

- CBS had scheduled the *Victoria's Secret Fashion Show* for 8 p.m. The affiliates objected to the early showing and urged that the program be moved to the 10 p.m. time slot. In response, CBS moved the show to 9 P.M., although some affiliates nonetheless preempted the show as having inappropriate content for their service areas.

- Promotional ads for NBC's *Dog Eat Dog* included shots of nude contestants promoting the program's challenges such as "strip football" and "strip golf." When affiliates objected to the explicitness of the promos and their airing at all times of day, NBC agreed to eliminate strip stunts from future episodes.

[1132] *Id.* at 27.

- *NYPD Blue* was originally designed to include more nudity and graphic language than is currently aired, but after ABC affiliates objected, the amount of nudity and graphic language in the show was reduced. Even so, a number of affiliates initially refused to carry the show.

- Affiliates expressed concerns about the violent and mature content of the series *Kingpin*, which concerns the life of a drug lord. In response, NBC agreed to allow affiliates to review episodes in advance to ensure the content is appropriate for their local communities.

- In 2002, CBS worked with affiliates to reformat its morning news program, *The Early Show*. One key issue of affiliate concern was whether they would be permitted to provide local news content during the two-hour time block used by the program, as they had with CBS' prior show, *CBS This Morning*. Although some local affiliates are permitted to use the blended format with *The Early Show*, CBS has refused to permit other affiliates to move to the blended local-network news program format.[1133]

- NBC affiliates objected to NBC's intention to broadcast the 2002 Olympic Games live, which would have preempted the evening news on the west coast. After initially resisting the requests of the west coast affiliates to air a delayed broadcast during prime time, the network conducted a viewer survey. Results of the survey, however, substantiated the affiliates' assertion that west coast viewers preferred to watch the games during prime time, and the networks complied.[1134]

- NBC affiliates initially objected to NBC's decision to require live broadcasting of the XFL games. On the west coast, games substantially preempted both the

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[1133] *Id.* at 25-26, 29-30.

[1134] *Id.* at 30-31.

affiliates' early evening local news and the national network news. In other parts of the country, overruns of the game preempted the late night local news. When affiliates raised similar concerns about Arena Football, claiming that overruns would preempt the 6 p.m. local newscasts on the east coast, the network agreed to work with the sports league to ensure the games do not run over.[1135]

- KYTV in Springfield, Missouri, preempted a January 6, 2003 episode of NBC's *Fear Factor*, which airs at 7 p.m. Central Time, that involved contestants eating horse rectums because it found the material inappropriate for its community.[1136]

544. Separate from this "collective negotiation" type of localism, parties also submitted evidence regarding the frequency of station-by-station preemptions for affiliates versus network-owned stations.[1137] Preemptions are instances in

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[1135] *Id.* at 30.

[1136] NAB/NASA Reply Comments at 16-17.

[1137] Affiliates described numerous examples of individual station preemptions of network programming. Some of these examples follow. WRAZ-TV in Raleigh, North Carolina, chose to stop airing *Temptation Island* after Fox revealed that one of the participating couples had a child because "WRAZ will not support a program that could potentially break up the parents of a young child." *Id.* at 17. WFAA-TV in Dallas did not carry the entire first season of *NYPD Blue* because it found the material and language inappropriate for programming scheduled to air at 9 p.m. in that community. *Id.* KNDX in Bismarck, N.D., refused to clear the Fox network's broadcast of the movie *Scream*, which is targeted to young viewers, because of its graphic and disturbing portrayal of teenage murders. *Id.* WFAA-TV, an ABC affiliate in Dallas, was denied permission to preempt *Monday Night Football's* half-time show on November 12, 2001 to cover an American Airlines plane crash. American Airlines is based in Dallas. According to NAB/NASA, ABC permitted two O&Os to preempt the same half-time show to air news covering the same crash. *Id.* at 37-38. CBS did not permit WTSP-TV in Tampa Bay to air a debate between Jeb Bush and Bill McBride during the Florida gubernatorial debate because the

which local stations, whether they are owned and operated by networks or independently owned but affiliated with these networks, choose to air a program other than the program the network distributes to the station. The networks submitted data comparing prime time preemption rates of network-owned stations versus affiliates for 2001. That data showed that affiliates preempted an average of 9.5 hours of prime time programming per year compared with 6.8 hours per year for network-owned stations.[1138] The networks claim that this difference is inconsequential and does not justify retention of a national ownership cap.[1139] Affiliates assert that even this hand-picked data by networks confirms that affiliates preempt more than network-owned stations and that a national cap is needed to protect localism.[1140]

545. Affiliates seek to explain low preemption rates by arguing that networks have increasingly restricted preemption

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affiliate would have preempted the season premiere of *48 Hours*. WTSP-TV was a cosponsor of the debate. *Id.* at 38. A Raleigh North Carolina Fox affiliate refused to air *Who Wants to Marry a Multimillionaire?* because it "felt it was demeaning to women and made a mockery of the institution of marriage." *Id.* at 38-39. WANE-TV, the Fort Wayne, Indiana CBS affiliate, sought to preempt network programming to air a half-hour, early morning local news program geared toward the agricultural community. Although this was initially denied, CBS ultimately relented and granted permission. *Id.* at 39. In this *Report and Order*, we use the terms "network-owned" stations and "O&O" (*i.e.* owned and operated) stations interchangeably.

[1138] Fox Comments, Economic Study G provides data showing: (1) both O&Os and affiliates preempt less than one percent of prime-time programming (in 2001); (2) the four networks' 57 O&O stations preempted an average of 6.8 hours per year per station compared to an average of 9.5 hours per year per station for 651 non-owned affiliates; and (3) on average, O&O stations preempt roughly the same amount of programming – 0.8 hours per station per year – as affiliates for news, political and public affairs programming. Fox Comments, Economic Study G.

[1139] *Id.*

[1140] NAB/NASA Reply Comments at 32-35.

through their network-affiliate contracts. Cox argues that the networks have been exacting greater concessions from their affiliates, including demands to decrease the number of preemptions.[1141] Affiliates complain that they are subject to preemption caps involving financial penalties or loss of affiliation if they exceed the number of network-authorized preemptions,[1142] while affiliates' local programs are often "preempted" by network overruns (*e.g.*, network sports overrunning local news).[1143] For example, Cox submits information gathered from its television stations in which the stations document their conflicts with the networks over network programming and local tastes and station preemptions.[1144] According to NAB/NASA, Fox allows only two preemptions per year, and NBC allows only five hours of prime-time preemptions per year. Affiliates that exceed their allowable preemption "basket" may be subject to financial penalties or even loss of affiliation.[1145] Thus, while a majority of affiliates did not exceed their permitted preemptions,[1146] affiliates argue that there are good reasons for that result. In addition, affiliates note that they often maintain a "cushion" of

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[1141] Cox Comments at 34-38.

[1142] NAB/NASA Comments at 39-43.

[1143] Cox Comments at 34-41; NAB/NASA Comments at 43-45.

[1144] Cox Comments at Appendix C-1.

[1145] NAB/NASA Comments at 39-41. NASA filed a Petition for Inquiry into Network Practices on March 8, 2001, and a Motion for Declaratory Ruling on June 22, 2001. NASA claims, among other things, that contractual language contained in network affiliation agreements violates the "letter and spirit" of Section 310(d) of the Communications Act of 1934, the right to reject rule and the time option rule (47 C.F.R. § 73.658(d) & (e)). We are addressing the merits of this petition separately from this proceeding.

[1146] Disney Comments at 4-7. Disney Exhibit G presents the number of available and used preemptions for ABC affiliates based on negotiated baskets of preemptions. According to Disney, during all of 2001, affiliates used only 56% of the permissible preemptions available to them and out of 189 affiliates, 150 did not exceed their baskets.

unused preemption time in case it is needed, requiring them to exercise discretion in "spending" their preemption time during the year to avoid contractual financial penalties associated with excessive preemption.[1147]

546. *Discussion.* We find that a national television ownership cap is necessary to promote localism. The evidence before us demonstrates both that network affiliates have economic incentives more oriented towards localism than do network-owned stations, and that affiliates act on those incentives in ways that result in networks delivering programming more responsive to their local communities (in the judgment of the affiliate) than they otherwise would. In order for affiliates to continue to serve local community tastes and needs in this way, a national cap is needed to preserve a body of independently-owned affiliates. The two ways in which affiliates can promote localism are by collective negotiation to influence the programming that the networks provide and by preemption by an individual station owner to provide programming better suited to its community.

547. The record shows that network-owned stations and affiliates have different economic incentives regarding the programming aired by local stations. We agree with NAB/NASA's study by Schwartz and Vincent that affiliates have an economic incentive to target their local audience by offering programs suited to local tastes.[1148] In so doing, affiliates have an incentive to tailor their programming schedule to meet local preferences.[1149] Localism is fostered by the affiliates' efforts to promote their own economic interest of maximizing the value of their stations by offering programming that local viewers will prefer to watch, even if the programming replaces the network's nationally scheduled programming.

[1147] NAB/NASA Reply Comments at 36-37.

[1148] NAB/NASA Comments, Schwartz/Vincent Paper.

[1149] Cox Comments at 47-52, 60-62.

548. The 2001 preemption data comparing network and affiliate preemption rates also supports retention of a national cap. The record shows that in 2001, affiliates preempted 9.5 hours per year of prime time programming versus 6.8 hours per year for network-owned stations. This data bolsters our conclusion that affiliates act on their economic incentives to preempt network programming with measurably greater frequency than do network-owned stations. Although we agree with the networks that the total number of hours preempted by both types of station owners in this comparison is relatively small, these data are for the prime time viewing period, when the vast majority of television viewing occurs. In our view, the practical effect of prime time preemption is far greater than that of preemption during other dayparts.

549. We cannot agree with Fox that network-owned stations provide the same localism value that independently-owned affiliates do. Fox argues that networks listen to the management of network-owned stations as well as to the management of affiliates. It claims that managers of O&Os participate during the networks' program development process and provide more credible input than the management of affiliate stations.[1150] Fox also asserts that affiliates have an "inherent economic conflict" with the network regarding the distribution of profits, have no influence in the development of new programs, and learn of the new programs at the same time as do advertisers.[1151]

550. We agree with Fox that affiliates have an inherent economic conflict with networks. However, we believe that affiliates' economic incentives actually help explain why affiliates regularly raise programming concerns with networks and why affiliates preempt more network programming, on average, than do network-owned stations. In our view,

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[1150] Fox April 21, 2003 Ex Parte at 2.

[1151] *Id.*

affiliates' economic incentives to maximize local viewership works to promote localism.

551. In addition, Fox's claim of minimal affiliate influence over programming is overcome by the significant evidence submitted by NAB/NASA that affiliates regularly raise programming concerns with networks and frequently succeed in altering network programming in ways that protect local interests. These numerous instances of the collective influence brought to bear by affiliates on network programming decisions represents a powerful force for the protection of local viewing interests. They represent empirical evidence that affiliates collectively serve as an important counterweight to network programming decisions by influencing networks to deliver programming responsive to local tastes.

552. In sum, we believe that this affiliate/network dynamic is beneficial to viewers and should be preserved. We conclude that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve our localism policy.[1152]

(ii) Appropriate Level of the Cap

553. In the preceding section, we found that a national television ownership cap continues to be necessary to promote localism because the record demonstrates that affiliates affect network programming in ways that respond to viewer preferences in affiliates' local communities. In this section, we examine the specific effects of the current 35% cap and whether this particular level achieves our localism objectives.

554. *Preemptions*. Affiliates argue that the networks have limited their ability to preempt network programming in order

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[1152] Our concerns are substantiated by statements from consumer groups asserting that large companies are less responsive to consumer complaints. *See* Catherine Yang, *The FCC's Loner is No Longer So Lonely*, BUS. WK. (Mar. 24, 2003) at 78.

to provide programming more geared to local needs and interests, and that these limits have become more formidable as the networks have extended their ownership of stations.[1153] Affiliates argue that an increase in the national cap reduces affiliates' ability to resist network pressure not to preempt. The affiliates point to a decline in affiliate preemptions following the 1996 increase in the cap from 25% to 35%. The affiliates' submission indicates that, with respect to all dayparts (as opposed to prime time-only), affiliates preempted, on average, 48 hours per year between 1991 to 1995 and 36 hours per year between 1996 to 2001.[1154] It also shows that, in the year 1995, the year before the cap was increased to 35%, there were, on average, 46 hours of programming preempted, but by the year 2001 the average had declined to 33 hours.

555. The networks offer two responses to the affiliates' data. First, the networks submit preemption data that, according to the networks, shows that the 35% cap has no effect on bargaining power between networks and affiliates. The networks contend that if higher levels of network station ownership actually increased networks' leverage over their affiliates, we would expect affiliates of the largest network station owners to preempt less (because of their diminished bargaining power) than affiliates of a network that had significantly less station ownership. The networks data shows that affiliates of the largest network-owners (CBS and Fox, at 39% and 38% national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of 23%.[1155] The networks assert that this data proves that the 35% cap has no effect on bargaining leverage between networks and affiliates.[1156]

[1153] NAB/NASA Comments at 31.

[1154] *Id.* at 16.

[1155] Fox April 21, 2003 Ex Parte at 8-9.

[1156] *Id.* In a motion filed May 28, 2003, NAB/NASA asked the Commission

556. Second, the networks argue that affiliate preemptions often are not for programming that is of greater public interest, but for syndicated programs.[1157] The data Disney submits suggests that more affiliates preempted ABC programming in favor of syndicated programming than for local specials.[1158] In addition, Disney states that very few half hours of affiliate prime-time preemptions were for news, political, or public affairs programming.[1159] Disney's data, however, is countered by a NAB/NASA survey of affiliated stations, in which respondents reported preempting network programming for: local breaking news (83% of respondents); local news (71% of respondents); local emergencies (70% of respondents); local political programming (74% of respondents); local sports (75%

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to disregard certain portions of network submissions concerning preemption and local news quantity because the networks have not provided the data underlying those submissions. Alternatively, NAB/NASA asked the Commission to infer that the underlying data would not favor the networks' positions on preemption and news quantity of O&O versus affiliate stations. The portions of the network filings the Commission is asked to disregard include, *inter alia*, EI Study G and Disney Exhibit G, relating to preemptions, and EI Study H, relating to local news quantity. Fox opposed the motion on May 29, 2003. We will afford the record evidence the appropriate weight in light of all circumstances, including the extent to which we believe the underlying data is necessary to make an informed decision about the showing.

[1157] Disney Comments at Exhibit H shows, among other things, that during the first quarter of 2002, affiliates preempted ABC programming more for syndicated programming than for local specials.

[1158] Disney Comments at 4-7. Disney Exhibit J shows, among other things, that during the first quarter of 2002, affiliates preempted ABC programming more for syndicated programming (201 half-hours) than for local specials (188 half-hours).

[1159] *Id.* The remaining prime-time preemptions were for sports, telethons, syndicated and local entertainment, paid programming, and paid religious specials. Disney Exhibit J shows that, for all of 2001, of 3,694 half-hours of primetime preemptions, 291 were for news, political, or public affairs programming; 574 half-hours were for telethons; 864 half-hours were for entertainment; 105 were for news; 171 were for public affairs; and 1,561 were for sports related shows.

of respondents); religious programming (47% of respondents); "other" programming (*e.g.*, parades, telethons, syndicated programming, movies) (34% of respondents).[1160]

557. Apart from contractual restrictions, a majority of affiliates responding to a NAB/NASA survey -- 68% -- report that they have "experienced pressure from [their] network to not preempt programming."[1161] UCC provides several instances of increased network resistance when affiliates attempted to air programs deemed to be of greater local interest than the network programming. For example, it cites to the experience of Belo's ABC affiliate in Dallas, the headquarters of American Airlines, which failed to get the network's permission to preempt the November 12, 2001, Monday Night Football halftime show for local news updates on the American Airlines jet crash in New York that morning.[1162]

558. *Discussion.* Although we concluded in the prior section that a national cap is needed to balance power between networks and affiliates, the record suggests that maintaining the cap at 35% is not necessary to preserve the balance of bargaining power between networks and affiliates. In reaching this conclusion, we rely principally on the evidence showing that the largest network station owners possess no greater bargaining power – as measured by prime time preemptions –

[1160] NAB/NASA Comments at 17-18, Table 2, Attachment 2.

[1161] *Id.* at 17. NAB/NASA sent the survey to 422 ABC, CBS, and NBC affiliated stations asking them to report on their experience with networks regarding preemption. It reports receiving 201 "usable" responses.

[1162] UCC Comments at 51-52 (citing Michele Greppi, *The Insider: A(BC's) Tale of Too-Different Cities*, ELECTRONIC MEDIA (Nov. 19, 2001) at 8). Among its other examples, CBS pressured a Florida affiliate into running the season premier of "48 Hours" instead of the state's gubernatorial debate. UCC Comments at 52 (citing Wes Allison, *Local PBS Affiliate Will Air Debate*, ST. PETERSBURG TIMES (Sept. 25, 2002) at 1B.). Also, NBC resisted attempts by affiliates to preempt a baseball game to air a presidential debate during the 2000 campaign. UCC Comments at 52 (citing Neil Hickey, *Unshackling Big Media*, COL. J. REV. (July/Aug. 2001) at 30).

than the smallest network station owner. We find this evidence persuasive because it directly compares the extent to which different levels of network ownership of stations actually affect the level of preemption by those networks' affiliates. Implicit in this analysis is an assumption that that data, although not a perfect proxy, is a reliable indicator of relative bargaining power between networks and affiliates. Preemption of network programming by an affiliate has negative consequences to the network, and networks by all accounts seek to avoid preemption by affiliates.[1163] So the ability of an affiliate to preempt in the face of networks' incentives to *prevent* preemption appears to be a reasonable measure of relative bargaining power between networks and affiliates.

559. We are not persuaded by the affiliates' argument that the 35% cap is needed to protect localism because the most recent national cap increase resulted in fewer affiliate preemptions. The principal deficiency in this argument is that it does not control for other plausible causes of the decline in affiliate preemptions. Although NAB/NASA suggests that the 1996 increase in the national cap reduced affiliates' bargaining power, NAB/NASA itself identifies other factors occurring in the same timeframe as the national cap increase that it claims have further eroded affiliate bargaining power. NAB/NASA asserts that the Commission's repeal of its financial interest and syndication rules in the early 1990s gave networks an additional financial incentive (in addition to their incentive to avoid preemption to maximize advertising rates) to discourage affiliate preemption. NAB/NASA contends that vertical integration, including program ownership and syndication by broadcast networks and the trend toward "repurposing" of network programming on affiliated non-broadcast channels

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[1163] *See, e.g.*, NAB/NASA Comments at 17 (stating that 68% of affiliates responding to a survey claimed that they have "experienced pressure from [their] network not to preempt programming").

have helped increase the networks' leverage over affiliates.[1164] To the extent these additional factors actually enhance network bargaining leverage as NAB/NASA contends, they undercut NAB/NASA's argument that it was specifically the 1996 increase in the national cap that caused affiliates to reduce their preemption of network programming.

560. A more accurate assessment of the impact of the 1996 national cap increase on network-affiliate bargaining leverage could be made if affiliate preemption rates from 1991 through 2001 could be compared to the preemption rates of network-owned stations during that same period. If preemption rates on network-owned stations were similar to affiliate preemption rates over that same period, we might have a more certain -- and completely different -- explanation for the decline. Networks might well have persuaded us that the uniform decline in preemptions by O&Os and affiliates was caused by some plausible reason unrelated to the change in the national cap. On the other hand, if the data had shown preemption rates on network-owned stations remaining steady while affiliate preemptions declined sharply after 1996, then the affiliates' explanation for the decline (*i.e.* increase in the national cap) would carry more weight than we give it here.

561. The foregoing analysis of preemption data excludes consideration of the content of the programming substituted by the local station for the network programming. Other than our interest in promoting market structures that encourage local news production, we seek to avoid resting broadcast ownership policies on subjective judgments about the public policy value of different types of locally-substituted programming. We agree with NAB/NASA that it is enough, for purposes of assessing stations' responsiveness to local communities, that they preempted network programming. The judgment of when

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[1164] *Id.* at 31-39.

to preempt and what to substitute are uniquely within the judgment -- and responsibility -- of the station.

562. Thus, we reaffirm our conclusion, in the *1998 Biennial Review Report*, that independently-owned affiliates play a valuable role by "counterbalancing" the networks' economic incentive to broadcast their own programming "because they have the right . . . to air instead" programming more responsive to local concerns.[1165] But, the evidence suggests that the current limit of 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved (discussed below) without disturbing either this balance or affiliates' ability to preempt network programming.

(iii) Other Effects of the Current 35% Cap

563. In the preceding sections, we examined two measures of localism -- collective affiliate influence on network programming and specific preemption levels by affiliates versus network-owned stations. In this section we consider a third measure -- the effect of the national cap on the quantity and quality of local news and public affairs programming. We examine this area because local news and public affairs programming can play an important role in citizen participation in local and state government affairs. Thus we seek market structures among broadcasters that encourage stations to produce local news and public affairs programming and thereby contribute to an informed citizenry.

564. In its 1984 decision, the Commission compared the quality and diversity of programming by stations owned by group owners – both network and non-network owners – with that of singly owned stations. It concluded that there was no

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[1165] *1998 Biennial Review Report*, 15 FCC Rcd at 11075 ¶ 30. In its remand, the *Fox Television* court did not dispute the Commission's view in the 1998 decision, but said the Commission failed to show whether it had received evidence substantiating its 1998 conclusion or repudiating its 1984 conclusion. *Fox Television*, 280 F.3d at 1043.

evidence that group owners provided less or lower quality news and public affairs programming than single owners.[1166] The *Fox* court criticized the Commission for failing to explain in the *1998 Biennial Review Report* why it departed from this conclusion. With the decline in the number of individually owned stations, an increase has occurred in the number of stations sharing common ownership. The Commission sought in this biennial review to understand whether the national TV ownership rule, by preserving a class of affiliates, affects localism by comparing the local news and public affairs programming of network owned and operated stations to that of non-network owned affiliates. We discuss the evidence and our conclusions below.

565. *Quantity of local news and public affairs programming.* In the *Notice*, the Commission requested evidence regarding any clear relationship between the ownership of stations and the quantity and quality of local news and public affairs produced by those stations.[1167] A study conducted by Commission staff concluded that network-owned stations produced more local news and public affairs programming than affiliates and received local news excellence awards more frequently than affiliates.[1168] Responding to that study, NAB/NASA submitted a study indicating that many of the results of MOWG Study No. 7 changed when data pertaining to stations belonging to Fox were not used.[1169] The final study, submitted by Dr. Michael Baumann of Economists Inc., demonstrates that no defensible reason exists for deleting the Fox station data.[1170] This final,

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[1166] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 32-34 ¶¶ 44-51.

[1167] *Notice*, 17 FCC Rcd at 18550 ¶ 148.

[1168] MOWG Study No. 7 at 3-6.

[1169] NAB/NASA Early Submission (Dec. 9, 2002).

[1170] Letter from Susan L. Fox, Vice President, Government Relations, Disney, to Marlene Dortch, Secretary, FCC (Feb. 13, 2003) ("Disney Feb.

comprehensive study provides analysis purporting to demonstrate that network-owned stations, on average, produce more local news than do affiliates across all-sized markets, with an even greater difference in the amount of news offered by network-owned stations in smaller markets.[1171]

566. The results of MOWG Study No. 7 show that network-owned stations air 23% more local news and public affairs programming per week than affiliates (22.8 hours versus 18.5 hours).[1172] In response to MOWG Study No. 7, NAB/NASA conducted a study that revealed no statistically significant difference between hours of local news aired by affiliates and O&O stations.[1173] Unlike MOWG Study No. 7, the NAB/NASA study included data on ABC, NBC and CBS, but did not include data on Fox Television.[1174] Disney argues that there is no policy-based rationale for excluding Fox stations.[1175] Using the NAB/NASA data, but accounting for all four of the networks, Dr. Baumann determined that network-owned stations on average provide more local news -- about 4.2 hours

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13, 2003 Ex Parte"). In response to a criticism of MOWG Study No. 7, which could also apply to Fox Economic Study H, Economists Inc. conducted a slightly modified analysis filed as part of "Economic Comments on Media Ownership Issues"), which was attached as an exhibit to the Fox Reply. *See also* Fox Comments, Economic Study H.

[1171] Disney Feb. 13, 2003 Ex Parte at Attachment.

[1172] Only MOWG Study No. 7 examined newspaper-owned affiliates separately from the other affiliates. It showed that, on average, newspaper-owned affiliates provided more hours per week of local news and public affairs (about 22 hours) than did the other affiliates (approximately 15 hours). The study also showed that network O&Os provided the most local news of all (almost 23 hours).

[1173] NAB/NASA Early Submission (Dec. 9, 2002).

[1174] *Id.* On May 5, 2003, NAB/NASA submitted another letter reiterating its argument. The submission, however, provided no new data or additional information. *See* Letter from Alan Frank, Chair, NASA, to Michael K. Powell, Chairman, FCC (May 5, 2003) ("NASA May 5, 2003 Ex Parte").

per week -- than do affiliates in all markets. In markets outside the top 25 markets, network-owned stations provide almost eight more hours of local news each week than affiliates do. Inside the top 25 markets, Disney agrees with the NAB/NASA study results that the difference between network-owned stations and affiliates was not statistically significant.[1176]

567. In Dr. Baumann's study, a third data set was used in analyzing local news and public affairs programming on network-owned and affiliate stations.[1177] Results, however, were similar to the first two studies: network-owned stations produce about 6.4 more hours per week of local news than affiliates in all markets tested. As with the modified NAB/NASA data, in markets outside the top 25 markets, network-owned stations provide about 9 hours additional local news each week. This study agrees with the NAB/NASA results that the difference between network-owned stations and affiliate stations in news provided was not statistically significant in markets inside the top 25 markets.[1178]

568. *Local News Quality*. Although the Commission does not regulate programming quality, it has attempted to strengthen the ability of local stations to serve their communities through news and public affairs programming. In the *Notice*, we sought to understand whether the national TV ownership rule may have the effect of increasing or decreasing the quantity and/or quality of local news and public affairs

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[1175] Disney Feb. 13, 2003 Ex Parte, Attachment at 7, n.6.

[1176] *Id.* at 8-9; NAB/NASA Early Submission (Dec. 9, 2002).

[1177] The measure of weekly minutes of local news, public and current affairs programming was provided by TV Guide for a week in May 2002. The set of explanatory variables includes market rank, whether a station was an O&O or not, and other market characteristics. Disney Feb. 13, 2003 Ex Parte, Attachment at 10.

[1178] *Id.* at 12; NAB/NASA Early Submission (Dec. 9, 2002).

programming.[1179] Studies discussing programming quality were submitted in the record.

569. MOWG Study No. 7, for example, finds that network O&O stations win more awards for local news programming than non-O&O affiliates. In evaluating the quality of local news programming, the authors used three measures: (1) ratings received for local evening news; (2) awards from the Radio and Television News Directors Association (RTNDA); and (3) the local television recipients of the Silver Baton of the A.I. Dupont Awards. The ratings of network-owned stations and affiliates were virtually identical during the period tested. However, with respect to the receipt of RTNDA awards for news excellence, network-owned stations received those awards at a rate of 126% of the national average and affiliates received them at 96% of the national average. The study found, with respect to the DuPont awards, network-owned stations received awards at 337% of the national average, while affiliates received awards at 77% of the national average.

570. The results of a second study, however, indicate that quality differences between network-owned stations and affiliates are virtually nonexistent. In comparing the record of network-owned stations and affiliates' news operations, a study by Economists Inc. on behalf of the networks focused on the RTNDA awards, one of the awards used in MOWG Study No. 7.[1180] It reasoned that, because a larger number of RTNDA awards are given out each year, they are more likely to offer a better measure of news quality than the DuPont awards. The study examined the RTNDA awards from two perspectives, first analyzing the awards bestowed in the top 10 markets, and then the top 50 markets. The study concludes that, in either setting, "there is no discernible difference between network-

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[1179] *Notice*, 17 FCC Rcd at 18550 ¶ 148.

[1180] Response of Fox to NAB/NASA Early Submission (Dec. 19, 2002) at 5 and App. 1.

owned stations and affiliates with respect to RTNDA awards."[1181] Neither this study nor MOWG Study No. 7 suggests that affiliates provide higher quality local news and public affairs programming than network-owned stations. Thus, the studies provide evidence that a national limit of 35% is not necessary to preserve a class of affiliates in order to maintain high quality local news and public programming.

571. UCC argues that the number of awards received by stations is not a reliable measure of quality because the awards are not equally available to both network stations and affiliates. It argues that stations must apply for awards and pay entry fees to be considered.[1182] Moreover, it argues, networks generally have promotion and publicity departments that handle award entries, while local stations do not.[1183] While we agree with UCC that factors unrelated to quality programming can affect the number of awards received, there is no evidence that these factors had any measurable effect on the conclusion that network-owned stations' news programming is at least equivalent in quality to that of affiliates.

572. A third study finds that smaller station groups tend to produce higher quality newscasts than larger groups.[1184] In the PEJ Study, affiliates generally had higher quality scores than network-owned stations. Sixteen percent of affiliate stations earned "A's" in programming quality versus 11% of network-

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[1181] *Id.* at App. 1 at 10-11. This study used the same data as MOWG Study No. 7.

[1182] UCC Comments at 55 (citing Radio-Television News Directors Association and Foundation, *Awards and Scholarships: 2003 RTNDA Edward R. Murrow Awards*, at www.rtnda.org/asfi/awards/murrow.shtml; The Graduate School of Journalism at Columbia University, *Alfred I. DuPont Columbia University Awards*, www.jrn.columbia.edu/events/dupont/entryform.pdf).

[1183] *Id.* (citing E-Mail from Jonnet S. Abeles, Director, Alfred I. DuPont Awards, Columbia School of Journalism, Nov. 7, 2002).

[1184] PEJ Study, supra note 769.

owned stations.[1185] According to PEJ's survey results, affiliates generally demonstrate somewhat more enterprise, cite more sources, tend to be more local, and are more likely to air stories that affect the community. Network-owned stations, on the other hand, are more likely to air national stories with no local connection, although they tend to air more points of view and score better in finding the larger implications of a story.[1186] The study also shows that only 22% of stations owned by the 25 largest group owners earned "A" grades for quality, compared with 48% of midsize and small groups. It acknowledges, however, that ratings for local news programming are growing more rapidly at larger group-owned stations than at smaller ones.[1187] Results of the PEJ Study suggest that being a network-owned station does not "improve the kind of local news that citizens see."[1188]

573. A critique prepared by Economists Inc. asserts that PEJ's principal findings are statistically insignificant.[1189] In addition, they contend the study relies on subjective measures of newscast quality, and does not account for other factors affecting news quality, such as geographic differences. In the critique, Economists Inc. states that PEJ has advised that it will not make underlying data available for analysis and review within the time frame of this proceeding; thus only limited information is available for use in determining the validity of PEJ's results.[1190] PEJ responds that the point of its survey was to identify patterns and trends in news quality. It asserts that it was not trying to prove a particular theory of cause and effect

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[1185] *Id.* at 4.

[1186] *Id.* at 9.

[1187] *Id.* at 3.

[1188] *Id.* at 8.

[1189] Economists Inc., "*The Project for Excellence in Journalism's PEJ Study of Ownership and Quality of Newscasts: A Critique*" (Mar. 13, 2003).

[1190] *Id.* at 2.

with its research, and states it has no financial stake in the outcome.[1191] Whether or not the PEJ Study is unbiased, its results appear statistically insignificant, the underlying data have not been made available, and therefore it cannot be considered reliable or convincing evidence.

574. The affiliates argue, however, that localism cannot be limited to local news and public affairs; rather, it is a rich mix of programming, and that the Commission itself has previously identified other elements, such as opportunities for local self-expression, development and use of local talent, weather and market reports, and sports and entertainment programming as necessary and desirable in serving the broadcast needs and interests of local communities.[1192] As we said in the *Notice*, stations may fulfill their obligation to serve the needs and interests of their communities by presenting local news and public affairs programming and by selecting other programming based on the particular needs and interests of the station's community.[1193] Thus, we acknowledge that other kinds of programming are important in serving local needs. However, we must rely on the data in the record, which focuses on two aspects of localism – program selection decisions by affiliates (preemption/collective negotiation) and the quality and quantity of local news and public affairs programming. From the data, we conclude that network-owned stations provide local news and public affairs programming that is at least equal, and may be superior, to that of affiliates.

575. *Discussion.* We conclude that the national cap is not necessary to encourage local stations to air local news and public affairs programming. The record actually suggests that the national cap diminishes localism by restraining the most

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[1191] PEJ Study, *supra* note 769.

[1192] NAB/NASA Reply Comments at 4 (citing FCC Form 303, Attachment A of 1960 Report and Statement of Policy re: Commission En Banc Programming Inquiry (July 29, 1960)).

[1193] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

effective purveyors of local news from using their resources in additional markets. The studies before us show that network-owned stations air, on average, more local news and public affairs programming than affiliates overall.[1194] MOWG Study No. 7 found that network-owned stations aired 4.3 hours more local news per week than did affiliates.[1195] The Baumann study concluded that the differential was 6.4 hours per week.[1196] The principal objection to the findings of these two studies was NAB/NASA's criticism that exclusion of the Fox stations from those two studies would nullify the differential between the two groups of stations.[1197] We agree with Disney that no valid reason exists for excluding the Fox stations.

576. The record also shows that local news on network-owned stations appears to be of higher quality than news on affiliate stations. MOWG Study No. 7 found that network-owned stations received local news excellence awards at a significantly higher rate than did affiliates. For the DuPont awards, networks received 337% of the national average compared with 77% for affiliates. For the RTNDA awards, networks received 126% to affiliates' 96%.[1198] We disagree with commenters relying on the PEJ study to show that smaller group owners tend to produce higher quality local news. We agree with the networks that the findings of the PEJ are statistically insignificant. In other words, according to widely-accepted scientific standards, there is an unacceptably large risk that the PEJ's findings are attributable to random noise in the data. The PEJ Study reports the differences in percentages of

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[1194] MOWG Study No. 7.

[1195] *Id.*.

[1196] Disney Feb. 13, 2003 Ex Parte.

[1197] NAB/NASA Comments at 46.

[1198] A score of 100% for a station group would indicate that the stations in that group won precisely the number of awards that would be expected given the number of stations in that group relative to the total number of stations in the U.S.

newscasts that received a particular grade, but fails to provide any statistical testing on these results. The networks conducted these statistical tests and determined that the differences in news quality were not large enough to conclude that the probability of a newscast getting a particular grade was dependent on the ownership group that aired the newscast.

577. In sum, the record shows that the national cap is not necessary to promote high quality, or relatively larger amounts of, local news programming. The record suggests the opposite – that the current cap prevents networks from acquiring more stations and providing enhanced local news operations.

3. Modification of the National Television Ownership Rule

578. We have concluded that an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market. We are persuaded, however, that a national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates. We found that affiliates' incentives are more attuned to their local communities than are those of networks, which seek to assure that the largest audiences possible are watching their programming at the same time. We conclude from the record that preserving a balance of power between a network and its affiliates promotes localism, and accordingly, we will continue to restrict the national audience reach of station owners.

579. Given the benefits to innovation discussed above that derive from having a number of separately-owned station groups, we believe the national ownership cap should continue to apply to all station owners, including those that are not networks. The record shows that there have been a number of instances where having a variety of owners has led to innovative programming formats and technical advances, and we believe that applying the national ownership cap to all station owners will continue to spur innovation, which we believe will be particularly valuable in transitioning to digital

television. In addition, applying the cap to all station owners adheres to our longstanding policy of refusing to differentiate among different categories of station owners for purposes of the national TV ownership rule.[1199]

580. The next task is to determine what the ownership limit should be. As the court in *Sinclair* recognized, the Commission has wide discretion when drawing administrative lines.[1200] Having found that 35% is too low and 100% (or no limit) is too high, after considering the evidence in the record, we apply our discretion and raise the national ownership cap to 45%. This modification, fundamentally, is a line-drawing exercise in which we attempt to balance the benefits of a television ownership cap against the factors favoring an incremental increase. Finding a point between 35% and 100% is a matter of judgment falling within the particular expertise of the Commission.[1201]

581. We have decided to modify the national cap by raising it 10 percentage points for three primary reasons.[1202] First, while

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[1199] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 50-54 ¶¶ 97-107; *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 87 ¶ 30 n.36 (since the adoption of a national TV ownership restriction, the limitations "have been applied in a uniform manner to all industry participants").

[1200] *Sinclair*, 284 F.3d at 162.

[1201] *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"); *Health and Medicine Policy Research Group, et al. v. FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"); *Hercules Inc. v. EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness"). *See also* Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 30, 2003) at 1.

[1202] *But see* Letter from Jonathan D. Blake, Counsel for NASA, to Marlene Dortch, Secretary, FCC (May 8, 2003) Attachment at 7 (no evidence to

affiliates argue that it is necessary to preserve a balance of power between networks and affiliates so that affiliates can maintain adequate preemption rights, it is evident that networks can exceed a nationwide audience reach of 35% without harming affiliates' abilities to preempt network programming. As discussed above, affiliates of networks with a national reach of greater than 35% seem to have no less bargaining power than affiliates of networks with less than 35% national reach. In accordance with Section 202(h), therefore, the cap must be modified upward. The record does not, unfortunately, help us identify with any precision the point at which a network audience reach would be so large that affiliate bargaining power would be substantially undermined. Given that we are interested in finding a point at which the balance of power between networks and affiliates is roughly equal, however, we believe that a national audience reach cap of approximately half of all homes would be appropriate.

582. Second, we are mindful of the predictive nature of this line-drawing exercise and we have some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits. Accordingly, and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, from 25% to 35%, we are inclined to take a similarly incremental approach and increase the cap by an additional 10 percentage points. Although a cap of 45% does not equate to a precisely equal degree of national reach for networks and their affiliates, a 45% limit ensures that networks will not obtain a greater national audience reach than their affiliates collectively will have.

583. Finally, although we elect not to modify the cap to the point advocated by Paxson (50%), we agree with Paxson that the cap should "accommodate all existing broadcast

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support raising the cap to 40%, 45% or 50%) ("NASA May 8, 2003 Ex Parte").

combinations and give some additional room for growth."[1203] A 45% cap will allow some, but not unconstrained, growth for each of the top four network owners.[1204] Broadcast networks have lost market share in recent years to cable and DBS, and allowing them to achieve better economies of scale and scope may help them remain competitive in the marketplace.[1205] Further, given the rise in programming costs and increasing competition from non-broadcast national media, the economies of scale and scope made possible by network expansion of station ownership will contribute to the preservation of over-the-air television by deterring the migration of expensive

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[1203] Paxson Comments at 13-15. We decline to adopt Paxson's suggestion that we establish a presumption to increase the cap biennially by at least 2.5% until it reaches 60%. *Id.*

[1204] Under the current rule, ABC owns ten stations reaching 23.6% of the national audience; CBS owns 39 stations reaching 39% of the national audience (these stations include the CBS as well as the UPN owned and operated stations, including 3 satellite stations); Fox owns 37 stations reaching 37.8% of the national audience (includes two satellite stations); and NBC owns 29 stations reaching 33.6% of the national television audience (these stations include the NBC as well as the Telemundo owned and operated stations, as well as a station located in Puerto Rico). *The Top 25 TV Station Groups*, B'CASTING AND CABLE (Apr. 7, 2003) at 32-34. There are currently 1,340 commercial television stations licensed by the Commission. The percentage of these television stations owned by each of these networks is as follows: ABC owns less than 1%; CBS owns approximately 3%; Fox owns approximately 3%; and NBC owns approximately 2%.

[1205] Paxson Comments at 10 (due to competition from cable and DBS, network prime time viewership has declined to 57%) (citing *2001 Video Competition Report*, 17 FCC Rcd at 1282). *See also* Letter from Jared S. Sher, Counsel for Fox, to Marlene Dortch, Secretary, FCC (April 30, 2003), Attachment at 52-54. We disagree with NAB/NASA that network profitability is not a valid reason for raising the national cap in this proceeding. *See* Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (April 23, 2003) at 1-2; NASA May 5, 2003 Ex Parte at 2-3; NASA May 8, 2003 Ex Parte, Attachment at 5-6.

programming, such as sports programming, to cable networks.[1206] Accordingly, we herein modify the national audience reach rule to impose a 45% cap.

584. Although we affirm our finding in the *1984 Multiple Ownership Report and Order* that increased network ownership of stations will not harm either competition or diversity,[1207] our decision to retain a national ownership cap is a departure from our conclusion in 1984 that the national TV ownership rule should be repealed.[1208] In 1984, we gave very limited consideration to the potential effects of the cap on localism.[1209] That attention was devoted to the quality and quantity of news and public affairs programming on group-owned versus individually-owned stations.[1210] In this *Report and Order*, by contrast, we have expanded our "localism" measures to include the important consideration of program selection by local stations. The 1984 decision did not address the balance of power between networks and affiliates and how that affects

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[1206] Fox Comments at 43 (the rule limits the return that networks can earn on their programming investments and drives them to direct their resources away from free television and toward subscription-based cable channels). Viewers complain that desirable programming already has begun migrating to subscription-based outlets. Thomas Smith Comments at 4; *see also* NABET-CWA Reply Comments at 2; The Grange Reply Comments at 3; Fox May 2, 2003 Ex Parte at 16; Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 12, 2003), Attachment 2 at 5-7.

[1207] *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 46, 50-54 ¶¶ 86, 97-107.

[1208] *See id.* at 18-20 ¶¶ 4-10.

[1209] In our 1984 decision, we acknowledged that "network-owned stations have rendered meritorious service to their local communities." *Id.* at 53 ¶ 105. This observation, which continues to hold true, does not, however, negate the importance of the affiliates' role in furthering localism.

[1210] *Id.* at 31-36 ¶¶ 44-56.

program selection.[1211] It is this factor that is the central factor in our decision to retain a national cap.

4. UHF Discount

585. In the *Notice*, the Commission invited comment on the relevance and continued efficacy of the 50% UHF discount.[1212] The *Notice* explained that the discount was enacted because UHF stations were competitively disadvantaged by weaker signals and smaller household reach than VHF stations.[1213] In light of greater carriage of UHF stations on MVPDs since enactment of the UHF discount in 1985, we sought comment on the continued need for the UHF discount.

586. We conclude that the UHF discount continues to be necessary to promote entry and competition among broadcast networks. VHF signals typically reach between 72 and 76 miles, while UHF signals reach approximately 44 miles. This signal disparity results in a significantly smaller household reach of UHF signals compared with VHF signals. Fox, NBC and Viacom submitted data showing that, in markets where they own both a UHF and a VHF station, the UHF station reaches between 56% and 61% of the service area of their VHF stations.[1214] Similarly, Paxson states that in eight cities where it owns UHF stations, its stations reach between 35.7% and

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[1211] *See* Cox Comments at 9; Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to Marlene Dortch, Secretary, FCC (May 9, 2003), Attachment at 2; Letter from Jonathan D. Blake, Counsel for NASA, and Henry L. Baumann, Executive Vice President for Law & Regulatory Policy, NAB, to the FCC Chairman and Commissioners (May 15, 2003) at 1-2.

[1212] *Notice*, 17 FCC Rcd at 18545 ¶¶ 130-131. The UFH discount is intended to recognize the deficiencies in over-the-air UHF reception in comparison to VHF reception.

[1213] *Id.* at 18545 ¶ 130.

[1214] Letter from John C. Quale, Counsel for Fox, to Marlene Dortch, Secretary, FCC (May 20, 2003) ("Fox May 20, 2003 Ex Parte").

78.2% of the homes reached by VHF stations in those markets.[1215]

587. This diminished UHF signal area coverage affects UHF stations' ability to compete with VHF stations in two ways. First, although cable and DBS operators serve 86% of U.S. households, the Commission recently determined that roughly 30% of television sets are not connected to MVPD service and receive exclusively over-the-air broadcast stations.[1216] UHF stations reach far fewer of these broadcast-only viewers as VHF stations. Second, weaker UHF signals make it more difficult for a UHF station to qualify for cable and DBS carriage. Commission regulations require a local television station to place a Grade B signal over the cable or DBS headend in order to quality for carriage.[1217] Alternatively, if a station does not place a Grade B signal over the headend, it may pay for an alternative method of delivering its signal to the headend, such as a fiber optic connection.[1218] Non-carriage on a cable system will, as a practical matter, make the UHF station unavailable to homes in the MVPD's service area.

588. In addition to diminished signal coverage, UHF stations require between 1.5 and 3 times greater electricity costs to operate than VHF stations.[1219] UHF stations also require more expensive transmitters than VHF stations.[1220] These factors, along with the signal coverage disparity, appear to diminish the ability of UHF stations to compete in the delivered video

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[1215] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 16, 2003) at Attachment 3.

[1216] *2001 Video Competition Report*, 17 FCC Rcd at 1282 ¶ 79.

[1217] 47 C.F.R. § 76.55(c)(3).

[1218] 47 C.F.R. § 76.66(g).

[1219] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 7, 2003) ("Paxson May 7, 2003 Ex Parte"), Attachment C at 11.

[1220] *Id.*

programming market. According to a 1997 study provided by Paxson, VHF affiliates of the top four broadcast networks had approximately 50% higher ratings than UHF affiliates of the top four networks.[1221] Paxson then replicated this study with 2002 ratings information and determined that the ratings disparity between UHF and VHF stations had actually *increased* between 1997 and 2002. Paxson's filing shows that, in November of 2002, network-affiliated VHF stations received approximately 57% higher ratings than network-affiliated UHF stations, compared with 50% in 1997.[1222] Thus, even after controlling for factors such as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations. This disparity translates into reduced advertising revenues for UHF stations.[1223] Thus we disagree with UCC that the UHF handicap has largely been eliminated by greater cable and DBS carriage of UHF signals.[1224]

589. In addition to strengthening competition between UHF and VHF stations, the UHF discount promotes entry by new broadcast networks. Paxson asserts that UHF discount enhanced its ability to launch a new broadcast network because it could own more UHF stations than VHF stations. Paxson states that the additional ownership of stations permitted by the UHF discount provides a significant financial incentive for new networks to enter and compete with established networks.[1225]

[1221] Paxson May 7, 2003 Ex Parte, Attachment C at 9 (stating that VHF-based affiliates received a 9.6 prime time rating compared UHF affiliates' 6.4 rating).

[1222] Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, Secretary, FCC (May 30, 2003). Attachment at 2.

[1223] Fox May 20, 2003 Ex Parte, Declaration of Michael Ward, General Manager, WNCN(TV) (stating that advertisers routinely discount the prices paid for advertising on UHF stations versus VHF stations).

[1224] UCC Comments at 57-58.

[1225] Paxson May 7, 2003 Ex Parte, Attachment C at 18.

This is because ownership of stations, as opposed to affiliation with separately-owned stations, enables a network such as Paxson's to earn both national and local advertising revenues.[1226] Univision also states that the UHF discount has enabled it to enter the market with programming tailored to Hispanic audiences. Univision explains that its entry as a broadcast network is particularly beneficial to Hispanic audiences because they rely disproportionately on over-the-air broadcast channels.[1227]

590. Finally, we observe that the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations.[1228] Instead of replacing their VHF stations with UHF stations and owning up to 70% national coverage, they have retained their VHF stations and sought elimination of the national ownership cap. By contrast, Paxson, a recent entrant into the broadcast network business, owns 61 stations, all of which are UHF.[1229] Absent the UHF discount, Paxson's audience reach would be 61.8% of the nation's television households. This data indicates that the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market. For these reasons, we retain the UHF discount.

591. The Commission has previously said it will issue a notice of proposed rulemaking proposing a phased-in

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[1226] *Id.*

[1227] Univision Reply Comments at 6 (52.8% of Hispanic television households in the top 30 markets subscribe to cable television. This compares with 67.8% of U.S. households that subscribe to cable overall.). *See* OPP Working Paper 37 at 41.

[1228] *The Top 25 Station Groups*, BROADCASTING & CABLE, Apr. 7, 2003.

[1229] Paxson owns 61 stations, 60 of which belong to the PAX television network. Paxson also owns a station that is affiliated with ABC. *Id. See also* Paxson Comments at 2.

elimination of the discount when DTV transition is near completion.[1230] At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized. Therefore, we will sunset the application of the UHF discount for the stations owned by the top four broadcast networks (*i.e.*, CBS, NBC, ABC and Fox) as the digital transition is completed on a market by market basis. This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition. For all other networks and station group owners, we will continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks. In a subsequent biennial review, we will determine whether to include stations owned by these other networks and station group owners in the sunset provision we have established for stations owned by the top four broadcast networks.

B. Dual Network Rule

592. The dual network rule provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[1231] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top-four" networks, *i.e.*, ABC, CBS, Fox, and NBC. In this *Order*, we conclude that the dual network rule is necessary in the public interest to promote competition and localism.

[1230] *1998 Biennial Review Report*, 15 FCC Rcd at 11079-80 ¶ 38.

[1231] 47 C.F.R. § 73.658(g).

1. Background

593. The original dual network rule, which prohibited any entity from maintaining more than a single radio network, was adopted over sixty years ago.[1232] The rule was later extended to television networks.[1233] The Commission believed that an entity that operated more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be affiliated with the more powerful network entity.[1234] In addition, the Commission expressed concern that ownership of more than one network could give the owner too much market power.[1235] The rule, therefore, was intended to serve the Commission's competition and diversity goals.[1236]

594. In the 1996 Act, Congress directed the Commission to amend the rule,[1237] which it did, to permit common ownership of two or more broadcast networks, but not a merger among ABC, CBS, Fox, or NBC, or between one of these top-four

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[1232] 6 Fed. Reg. at 2282 (May 6, 1941).

[1233] *Amendment of Part 3 of the Commission's Rules*, 11 Fed. Reg. 33 (Jan. 1, 1946).

[1234] *1998 Biennial Review Report*, 15 FCC Rcd at 11095-96 ¶ 70.

[1235] *Id.*

[1236] *Id.*

[1237] Section 202(e) of the 1996 Act directed the Commission to modify the dual network rule to prohibit a television station from affiliating with any entity that owns more than one of the four major networks (ABC, CBS, Fox, or NBC) or one of the four major networks and an emerging English-language network which, on the date of the 1996 Act's enactment, "provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes." 1996 Act, § 202(e). The legislative history of the "emerging network" provision indicated that it was intended to apply to only the UPN and WB television networks. *See* S. Rep. No. 230, 104th Cong., 2d Sess. at 163.

networks and UPN or WB.[1238] In 2001, the Commission further modified the rule to permit a top-four network to merge with or acquire UPN or WB.[1239] The Commission found that: (1) competition in the national advertising market would not be harmed; (2) greater vertical integration was potentially an efficient, pro-competitive response to increasing competition in the video market; and (3) program diversity would not be harmed because the two combined networks would have economic incentives to diversify their program offerings.[1240]

595. The restrictions in the current rule apply only to combinations of the top-four networks. All existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. Thus, the current rule permits common ownership of multiple broadcast networks created through internal growth and new entry.

596. Although the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations may operate multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox, and NBC to develop multiple broadcast networks by: (1) creating new broadcast networks; (2) acquiring new broadcast networks; or (3) acquiring video networks from non-broadcast media (*e.g.*, cable or satellite) and migrating them to broadcast networks. However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another.

597. In the *Notice*, we sought comment on whether the present dual network rule is necessary in the public interest as the result of competition. We asked whether it promotes the

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[1238] *See* note 1065, *supra*.

[1239] *Dual Network Order supra* note 97.

[1240] *Id.* at 11124-25, 31 ¶¶ 24-25, 37.

goals of competition, diversity, or localism. We further asked whether, if the rule serves some of our purposes and disserves others, the balance of its effects argue for keeping, modifying, or abolishing the dual network rule.[1241]

598. Despite the voluminous record developed in this proceeding, few commenters addressed the dual network rule.[1242] Several commenters assert that the top-four networks are unique in that they regularly compete against each other for viewers (*i.e.*, their programming is targeted at similar national audiences, as opposed to the niche audiences smaller broadcast networks and cable networks target), that they each consistently generate the largest national audiences for their programming (thereby receiving the most advertising revenue, which, in turn, provides the funding to purchase the most desired programming), and that competition would be harmed by allowing any of them to merge.[1243] Several commenters also assert that concentration of ownership in the top-four networks would result in harms to diversity by providing fewer national and local viewpoints in news reporting and fewer programming choices for viewers.[1244] One commenter also argues that localism would be harmed by a top-four network merger because the merger would increase the economic leverage the networks have over their affiliates.[1245] The sole commenter arguing for elimination of the rule, Fox, asserts that competition

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[1241] *Notice*, 17 FCC Rcd at 18552-53 ¶ 159.

[1242] Those specifically mentioning the dual network rule in their comments are: AFL-CIO; AFTRA; CCC; Children Now; CWA; Fox; NAB/NASA; Smith; Stapleton; UCC; and Writers Guild. Of these eleven commenters, five devoted one paragraph or less to a discussion of the rule.

[1243] *See* CCC Comments at 17; NAB/NASA Comments at 73-74, 77; Stapleton Comments at 16; Writers Guild, *et al.* Comments at 16.

[1244] *See* AFL-CIO Comments at 63-64; AFTRA Comments at 36-38; CCC Comments at 18-19; UCC, *et al.* Comments at 59-60; Writers Guild, *et al.* Comments at 14.

[1245] *See* NAB/NASA Comments at 75-76.

will not be harmed because consumers have access to a vast array of other media outlets, that diversity will be maintained because common network ownership provides incentives to produce a diverse schedule of programming, and that localism will not be affected because stations have strong financial incentives to provide local programming regardless of their network affiliation.[1246] We analyze these arguments below in discussing whether the rule is necessary in the public interest as the result of competition.[1247]

2. Discussion

599. Under Section 202(h), we consider whether the dual network rule continues to be "necessary in the public interest as the result of competition." In determining whether the rule meets this standard, we consider whether the rule promotes competition, localism, and diversity. We conclude that the dual network rule continues to be necessary in the public interest to promote competition and localism.

a. Competition

600. We begin by summarizing the complex roles played by broadcast networks. Broadcast networks acquire a collection of programs from program producers. The programs are selected based on their ability to attract audiences that can be sold to advertisers. These programs - with advertisements embedded - are then made available to television audiences through the broadcast network's owned and operated broadcast television stations ("O&Os"), and also through contractual arrangements with affiliated broadcast television stations. Thus, a broadcast network serves many roles. It is an intermediary between local broadcast stations and advertisers and program producers.

[1246] *See* Fox Comments at 44-45, 47-48.

[1247] In its Comments, NAB/NASA states that "NAB takes no position on whether the Commission should retain the current version of the dual network rule." NAB/NASA Comments at 72; NAB/NASA Reply Comments at 57. The arguments opposing changes to the dual network rule are therefore made by NASA.

Because the top-four broadcast networks are participants in the program acquisition market and the national advertising market, mergers among them can affect competition in each of these markets.

601. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group"[1248] in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition.

(i) Program Acquisition Market

602. The top-four networks are the broadcasting components of vertically-integrated firms, which compete against each other to acquire programming that will attract the largest national audiences.[1249] Competition in the program acquisition market is important because networks compete with each other to acquire new, diverse, and innovative programming. A top-four network merger would give rise to competitive concerns that the merged firm would restrict the consumption of programming by using its market power to limit competitors' access to sources of programming. In addition, the merged network could use its market power to control the price it pays for programming or to raise competitors' costs of acquiring programming. In concentrated markets, viewers have access to

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[1248] A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. *See* footnote 1262, *infra*, for a discussion of strategic groups.

[1249] ABC (a broadcast network) is vertically integrated with Disney (a program supplier); CBS (a broadcast network) is vertically integrated with Viacom (a program supplier); Fox (a broadcast network) is vertically integrated with News Corp and 20th Century Fox (a program supplier); and NBC (a broadcast network) is vertically integrated with NBC Entertainment's subsidiary NBC Studios (a program supplier).

fewer programming choices if the number of national, independent purchasers of programming decreases due to limited access to programming and higher programming costs.

603. NASA argues that a merger of two or more of the top-four networks would result in a less competitive program acquisition market, evidenced by lower output, fewer choices, and less technological progress.[1250] CCC argues that the top-four networks represent a distinct and important resource for viewers because only they are able to consistently distribute both news and entertainment programming to a mass audience, using their cable subsidiaries and local broadcast affiliates.[1251] Fox, on the other hand, argues that the rule actually undermines the Commission's competition policy by discouraging broadcast investment to the detriment of consumers of free over-the-air television.[1252] Fox also argues that the program acquisition market is only moderately concentrated, having an HHI of approximately 1120.[1253] In support of this argument, Fox asserts that the program acquisition market is characterized by a large number of purchasers of exhibition rights, including broadcast networks, broadcast stations, cable networks, DBS operators, premium cable networks, pay-per-view providers, and distributors of video cassettes and DVDs.[1254] NASA counters that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs, and that the only avenue of distribution for such programs is the television broadcast networks.[1255] NASA therefore asserts that

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[1250] *See* NAB/NASA Comments at 58-60.

[1251] *See* CCC Comments at 17-18.

[1252] Fox Comments at 48.

[1253] Fox Economic Study E at 1. Fox economists excluded expenditures on news and sports programming because most of the inputs used in creating such programs are not readily substitutable with the inputs used in creating entertainment television programs and theatrical films.

[1254] *Id.*

[1255] NAB/NASA Reply Comments at 57. By NASA's estimate, which is

only the major broadcasting networks should be considered in an analysis of concentration in the purchase of national video programming.[1256]

604. We agree with Fox and NASA that the context for analyzing the program acquisition market is to consider the shares of expenditures on video entertainment programming. We conclude, however, that a more accurate assay of the market includes the shares of broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks. We reject NASA's narrow definition because they provide no evidentiary reason to exclude other video programming purchasers and they dismiss the range of programming choices available to viewers over the air, via cable and via satellite. We do not agree with Fox's more expansive definition, specifically the inclusion of home video, as that requires additional action on the part of individual viewers, such as purchasing a DVD player, driving to a video rental store, and renting a DVD. We conclude that using broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks in our analysis accurately represents the market participants, and their role in delivering programming to large, passive audiences. In order to examine the effect of mergers among broadcast television networks subject to this rule, we can construct hypothetical merger scenarios, building on the scenario developed in the national cap section of this Order. In the absence of actual figures for the network companies' broadcast station expenditures, we can only examine the effects of mergers amongst the networks (i.e., without their complement of O&Os,

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based on an analysis of Fox's Economic Study E, Table E2, the top-four networks account for over 87 percent of programming expenditures by broadcasting networks, and the video entertainment program acquisition market has an HHI of approximately 2100, a result considered "highly concentrated" under the DOJ/FTC Merger Guidelines. *Id.*

[1256] *Id.*, citing its Comments at 74-75.

but including the cable networks they own). For the same reason, we can only calculate the change in the HHI, not the "base level" HHI. So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples.

605. Accordingly, we conclude that a merger between or among any of the top-four networks would harm competition in the program acquisition market. As noted, we determine in our analysis of the national ownership cap that an increase in the cap would not harm the program acquisition market, principally because networks would be enhancing their owned and operated distribution base. Our analysis of a merger between two or more of the top-four broadcast networks, however, indicates a significant potential for harm to this market. In addition to acquiring an entire group of owned and operated stations and all of the affiliation agreements of the stations aligned with the network, a merger would also entail the acquisition of significant program purchasing power by the vertically integrated merging networks. The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network.[1257] In addition the merged firm can raise the price paid by those competitors for programming created and produced by the merged network's program production assets. The rule, therefore, remains

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[1257] Currently, one network studio may produce programming that is ultimately purchased by another network. For example, Paramount, a subsidiary of Viacom, produces the long running NBC series "Frasier" and the NBC series "Ed." Also, in addition to producing shows for The WB network, Warner Brothers has produced shows for ABC ("The Drew Carey Show" and "George Lopez") and NBC ("ER" and "West Wing").

necessary to promote competition in the program acquisition market.

(ii) National Advertising Market

606. Networks sell national advertising by creating large national audiences for their programming and delivering those audiences to advertisers. Sellers in the national advertising market include national broadcast networks, cable networks, and syndicators. Network O&Os, network-affiliated stations, and independent stations sell national spot advertising time, which is advertising sold on a market-by-market basis to national advertisers. National spot advertising time provides a competitive alternative to national advertising time to a certain extent. These sellers compete against each other not only based on the price they charge for advertising spots, but also based on their ability to deliver the largest number of viewers to their advertisers. If a merger were to reduce competition for advertising dollars, networks would have less incentive to compete against each other for viewers, which would lead them to pay less attention to viewers' needs and to produce less varied, lower quality, and less innovative programming.

607. In our discussion above of the necessity of maintaining the national TV ownership rule,[1258] we conclude that the networks compete with each other and with cable networks for national advertising revenues and that the current ownership cap was not necessary to ensure competition in the national advertising market. However, while we find that the top-four networks do not possess market power today, that would change if two or more of them were to merge with each other. Moreover, as explained in the *Dual Network Order*, the top-four networks comprise a "strategic group" within the national advertising market.[1259] The top-four networks compete largely

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[1258] *See* Section VII(A), *supra*.

[1259] *Dual Network Order*, 16 FCC Rcd at 11122-23 ¶ 20. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top-four networks supply their

among themselves for advertisers that seek to reach large, national, mass audiences – a significant portion of the national advertising market that provides the top-four networks with a significant portion of their profits. We therefore conclude that a merger of two or more of the top-four networks would substantially lessen competition in the national advertising market, especially within the strategic group,[1260] with the concomitant harm to viewers described above.

608. The recent growth of cable and DBS does not alter our conclusion. Despite that growth, the top-four networks continue to provide the greatest reach of any medium of mass communications. The top-four networks attract much larger prime-time audiences in relation to advertisement-supported

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affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. The conceptual basis for a strategic group is developed in R. E. Caves and M. E. Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition*, Q J ECON 91 (May 1977): 241-261. *Also see* Michael E. Porter, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITION (New York: The Free Press, 1980), Ch. 7. For additional references on the application of the strategic group concept, see F. M. Scherer and David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, (3rd ed.) (Boston: Houghton Mifflin, 1990) at 284-85. When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic in nature, although the number of firms actually populating the industry aggregated over all strategic groups may be quite numerous.

[1260] Our analysis suggests that economic concentration within the strategic group for 2001, as measured by the HHI, is 2646. This is based on advertising revenue and on shares of the top-four broadcast networks as reported by Richard Bilotti, *supra* note 1106. Any HHI above 1800 indicates a "highly concentrated" market. *See DOJ/FTC Merger Guidelines.* A merger between two or more of the top-four networks would produce a change in the HHI of over 100 points, which, according to DOJ guidelines, is an indication that such a merger should be reviewed to ensure that it would not enhance market power or facilitate its exercise. *Id.*

cable networks.[1261] Broadcasting's percentage share of advertising revenue continues to exceed its percentage share of viewing.[1262] Moreover, despite a decrease in audience share, the top-four networks continue to command increases in advertising rates, a further testament to the strength of broadcasting television as an advertising medium.[1263]

609. We agree with NASA that despite the emergence of new media on cable, DBS, and the Internet, the top-four broadcast networks still have the largest concentration of viewers and television economic power.[1264] A recent survey shows that each of the top twenty-five prime-time broadcast programs during the week of December 9-15, 2002, all of which were aired by CBS, ABC, NBC, or Fox, achieved considerably higher household ratings than any of the 25 highest ranked cable programs.[1265] The highest-ranked

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[1261] For example, during the month of February, 2003 (1/27/03 – 2/23/03), CBS, NBC, ABC, and Fox delivered prime-time household ratings of 8.9, 8.1, 6.7, and 6.7, respectively, as compared to the top advertiser-supported cable network, TNT, which garnered a 1.8 share rating. (A rating point is equal to 1.067 million households.) *See* Television Bureau of Advertising, Viewer Track, *Monthly Broadcast vs. Cable Primetime Ratings: Feb-2003 vs. Feb-2002*, at http://www.tvb.org/rcentral/viewertrack/monthly/mon-b-c/mon-b-c.asp?ms=Feb-2003_vs_Feb-2002.html (visited March 7, 2003).

[1262] *See e.g.*, NAB/NASA Comments at 13, stating that broadcasting's share of advertising revenue in 2001 was 71.5% whereas its audience share stood at 53.7%. In addition, the networks have been able to increase the quantity of advertising availabilities for sale by adding more commercial minutes per hour. *Id.*

[1263] The networks have raised prices for advertising on a cost per thousand ("CPM") viewers basis steadily. Prime-time broadcast network CPMs have increased from $9.74 in 1990 to $13.42 in 2000, an average annual growth rate of 3.8%. *See* OPP Working Paper 37 at 28. In addition, an advertising industry compilation indicates that the top-four commercial networks increased hourly commercial minutes by 16.4% from 1991 to 2000, from an average of seven minutes and 47 seconds to an average of nine minutes and three seconds. *Id.*

[1264] NAB/NASA Comments at 74.

[1265] *Id.*, citing Television Bureau of Advertising, Inc., Viewer Track, *Top 25*

broadcast program had a rating larger than the top five cable programs' ratings combined.[1266] We also agree that as it becomes more difficult to reach a large number of viewers, television broadcasters that can still deliver a mass audience become more valuable.[1267]

610. We further conclude, as we did in the *Dual Network Order*, that obtaining a sufficient number of affiliated stations remains a major obstacle to developing a new broadcast network capable of attracting national advertisers seeking to reach a mass audience.[1268] As long as mobility barriers[1269] deter entry into the major network strategic group, the pricing of network advertising will be sensitive to the number of network competitors.[1270] We therefore conclude that the current dual network rule is necessary to maintain competition in national advertising market.

b. Localism

611. We conclude that the dual network rule also is necessary to retain the balance of bargaining power between the

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Programs on Broadcast and Cable: Week Ending Dec. 15, 2002, at http://www.tvb.org/rcentral/index.html (visited Jan. 1, 2003).

[1266] *Id.*, citing also its earlier notes 34-35 and accompanying text (observing that 99 of the 100 top-rated prime-time programs are broadcast programs, and that the combined average viewership for the four major broadcast networks is almost six times as high as that of the top ten ad-supported cable networks).

[1267] *See* NAB/NASA Comments at 75.

[1268] *Dual Network Order*, 16 FCC Rcd at 11123 ¶ 20. *See also* NAB/NASA Comments at 73.

[1269] Mobility barriers are barriers to entry that deter the movement of a firm *within* a given industry from shifting from one strategic group to another. Different strategic groups will be defended by different mobility barriers that vary in their effectiveness in restricting entry into a given strategic group. In general, firms protected by high mobility barriers will have greater profit potential than firms in other strategic groups protected by low mobility barriers.

[1270] *See also* NAB/NASA Comments at 75.

top-four networks and their affiliates. As noted in the national TV ownership rule section, we conclude that affiliates play an important role in assuring that the needs and tastes of local viewers are served.[1271] Elimination of the dual network rule would harm localism by providing the top-four networks with increased economic leverage over their affiliates, thereby diminishing the ability of the affiliates to serve their communities.[1272]

612. The top-four networks have an economic incentive to promote the widest distribution nationwide of the programming that they produce and to assure that it is carried simultaneously across the country. To reach the most viewers, the top-four networks acquire their own stations ("O&Os"), usually in the largest television markets, and enter into affiliation agreements with station owners throughout the remainder of the country. Through affiliation, the networks benefit from the wide-area delivery of their programming. Network affiliates benefit, in turn, by gaining access to high-quality programming.

613. Affiliates have an economic incentive to tailor their programming to their local audiences. Affiliates can influence network programming decisions by joining forces with other network affiliates in collective negotiations to ensure that the programming provided by the network serves local needs and interests. The strength of an affiliate's influence with its network lies in its power as part of a "critical mass" to join forces with other network affiliates in collective negotiations to try to influence network programming.[1273] On an individual basis, affiliates may also decide to preempt network programming if other programming is available that better suits local needs.

[1271] *See* Section VII(A), *supra*.

[1272] *See id.* for a discussion of localism and its importance in the balance of power between networks and their affiliates.

[1273] NAB/NASA Comments at 2-3.

614. As noted by NASA, because of the costs of programming and promotional expenses, network affiliation remains critical for the economic survival of most local television stations.[1274] NASA argues that if the dual network rule were eliminated, a top-four network merger would result in the networks gaining an unfair advantage over their affiliates, noting that a merger would reduce alternative choices of program providers for affiliates as the number of network owners decreases.[1275] As an example, NASA notes that if NBC and CBS were permitted to merge, a terminated CBS affiliate would no longer be able to turn to NBC for affiliation.[1276] The harm would be exacerbated if more than two of the top-four networks were to combine.

615. We agree with NASA that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates. While a top-four network merger may not result in fewer networks, it would result in fewer network *owners*. We conclude that a top-four network merger would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, and would result in less influence of affiliates on network programming. As the number of network owners declines, affiliates lose the ability to use the availability of other top independently-owned networks as a bargaining tool with their own networks. In the same way, a combined top-four network's increased leverage could be used to overwhelm affiliate bargaining power with respect to programming issues. A top-four network merger would lead to fewer alternatives for affiliates, which would lead to reduced bargaining power of affiliates, and less influence of affiliates on network programming, including the ability to preempt network programming that affiliates find to not serve

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[1274] *Id.*

[1275] *Id.* at 75-76.

[1276] *Id.*

their local communities. We therefore conclude that the dual network rule remains necessary to foster localism.

c. Diversity

616. In the *Notice*, we sought comment on the dual network rule's effect on program diversity and viewpoint diversity.[1277] As noted in the national TV ownership rule section, we conclude that the market for diversity is local, not national.[1278] As also noted, we conclude that viewpoint diversity is the most pertinent aspect of diversity for purposes of our ownership rules.[1279] Nevertheless, since several commenters argue that elimination of the dual network rule would result in a diminution of program diversity, we address their arguments.[1280]

617. Several commenters argue that elimination of the dual network rule would result in less diverse programming and that national viewpoints in news reporting would be diminished.[1281] AFL-CIO and AFTRA argue that recent mergers and consolidation in the industry have resulted in instances of reduced viewpoint diversity and program diversity in local markets.[1282] AFTRA also argues that elimination of the rule

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[1277] *Notice*, 17 FCC Rcd at 18553-54 ¶¶ 160-163.

[1278] *See* Section VII(A) *supra*.

[1279] *See id.*

[1280] *See* UCC Comments at 59-61; NAB/NASA Comments at 78; AFL-CIO Comments at 61-62; AFTRA Comments at 34; and CCC Comments at 19.

[1281] *See* CCC Comments at 19; UCC Comments at 59; AFL-CIO Comments at 61-62; AFTRA Comments at 34-35; and NAB/NASA Comments at 78.

[1282] AFL-CIO Comments at 61-62, gives the following as examples: Viacom in Philadelphia owns the local CBS and UPN television stations and KYW-AM radio, and has assigned radio anchors to produce news for UPN; Viacom in Detroit dropped its local CBS-TV news and has contracted WXYZ to produce its UPN-TV news; and NBC is combining its news operations with Telemundo. AFL-CIO further states that BET, which is now owned by Viacom, has cancelled several news-related and public affairs shows, and that NBC O&Os have begun to merge station operations with Paxson TV affiliates, only rebroadcasting NBC news on PAX stations. *See*

will quell new voices and diverse viewpoints, "as emerging networks are quashed in favor of more 'cost-effective' means of delivering content."[1283] CCC argues that because CBS is "repurposing" its original programming on UPN, diversity between the two networks is reduced.[1284] CCC also argues that WB, UPN, and the cable networks do not have the audience reach or the resources to fill the diversity void created if the national networks were reduced by elimination of the rule.[1285] Fox disagrees, arguing that the vast array of other media outlets will provide the public with sufficiently diverse information and views.[1286]

618. One commenter, UCC, argues that despite recent gains in the popularity of other forms of media, national broadcast television continues to be the public's most important source for national and international news.[1287] UCC argues that the average weekday reach of the evening newscasts of ABC, CBS and NBC is about 10 times the combined reach at 6:30 p.m. for Fox, CNN, CNN Headline News, MSNBC, and CNBC.[1288] Because network news on broadcast television is expensive to produce, UCC argues, a top-four network merger would result in the consolidation of news departments in order to achieve economic efficiency.[1289]

619. In the *Dual Network Order*, the Commission found that program diversity at the national level would not likely be harmed by the combination of an emerging network (*i.e.*, UPN or WB) with one of the top-four networks. The Commission

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also AFTRA Comments at 34-35.

[1283] AFTRA Comments at 34.

[1284] CCC Comments at 19.

[1285] *Id.* at 18.

[1286] Fox Comments at 44-45.

[1287] UCC Comments at 60.

[1288] *Id.* at 60 (citation omitted).

[1289] *Id.* at 60-61.

found it likely that a common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market.[1290] In this proceeding, we address possible combinations among only the top-four networks, which are distinct from combinations between a top-four network and an emerging network.[1291] Also, we find in this proceeding that the market for diversity is local, not national.[1292] Further, as noted in the Policy Goals section above, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation.[1293]

620. We are unable to conclude that the dual network rule can be justified on program diversity or viewpoint diversity grounds. Although we received conjectural statements regarding the repurposing of some programming, and stories of news operations being shared in a few markets, these reports do not evidence a systematic reduction in diversity as a result of

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[1290] *Dual Network Order*, 16 FCC Rcd at 11131 ¶ 37. Fox argues in this proceeding that a top-four network merger would result in the same incentives for the merged firm, and that all network outlets, regardless of ownership, will continue to pursue the elusive goal of divining audience tastes. Fox Comments at 45-47.

[1291] We agree with NAB/NASA that the Viacom/UPN (top-four network/emerging network) example cannot be extrapolated to a situation in which a top-four network takes over another one (with which it directly competes), because, as admitted by Viacom, CBS and UPN do not compete for the same viewers. *See* NAB/NASA Reply Comments at 59-60. NAB/NASA notes that in the 2001 Dual Network proceeding, Viacom argued that CBS did not really compete with UPN. Rather, it stated that its principal competition came from the broad-based traditional networks operated by ABC, NBC, and increasingly Fox. NAB/NASA Comments at 77, citing Viacom's Comments to the *Notice of Proposed Rulemaking* in MM Docket No. 00-108, 15 FCC Rcd 11253 (2000) at 22. *See also* Fox Comments at 46, where Viacom states that "CBS and UPN have set their sights on entirely different demographics."

[1292] *See* Section VII(A), *supra*.

[1293] *See* Section III(A)(2), ¶ 37, *supra*.

media mergers. The record provides no evidence that, because some stations share news operations, viewpoint diversity is diminished. Further, even if a merger among ABC, CBS, or NBC would result in the loss of one weekday evening newscast, a substantial number of outlets that report national/international news would remain to provide diverse viewpoints throughout the day to the public.[1294] Finally, to the extent that we consider programming diversity an issue, the record provides no evidence that the repurposing of programming on different networks results in a diminution of program diversity. In fact, we found in the *Dual Network Order* that the repurposing of programming between two merged networks was likely to produce net benefits to viewers of network television.[1295]

3. Conclusion

621. Given the level of vertical integration of each of the top-four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming. These competitive harms would, in turn, harm viewers through reductions in program output, program choices, program quality, and innovation. We further conclude that a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates, reducing the ability of affiliates to bargain with their network for favorable terms of affiliation, giving the networks greater power in

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[1294] These outlets include cable news networks, daily and weekly newspapers, magazines, and the numerous news-related websites on the Internet. *See* Appendix B, listing all national news sources. In any event, we question the assumption that a merger among ABC, CBS, or NBC would result in the elimination of a news department, particularly considering that each network currently attracts a substantial number of viewers to its weekday evening newscast.

[1295] *See Dual Network Order*, 16 FCC Rcd at 11124-25 ¶ 24.

program selection, and diminishing alternative choices of programming for affiliates. As a result, we conclude that the dual network rule remains necessary in the public interest to foster competition and localism.

VIII. MISCELLANEOUS REQUESTS

622. Numerous parties submitted comments on issues not specifically raised in the *Notice*. As discussed below, we dismiss most of these requests on procedural grounds because they fall outside the scope of this proceeding. We do not review the merits of these requests. To the extent appropriate, parties are free to re-file these requests as petitions for rulemakings. We deny others for the reasons discussed herein.

A. Requests That Are Outside the Scope of the Proceeding

1. Proposed Behavioral Rules.

623. Several parties ask that we impose behavioral rules to achieve a number of alleged public interest goals. We invited comment in the *Notice* as to whether behavioral rules might render structural rules unnecessary to achieve our public interest goals of diversity, competition, and localism.[1296] The following proposals, however, relate to policy goals that are unrelated to those served by our structural rules and are therefore outside the scope of the *Notice*.

624. *TV Viewing*. TV Turnoff Network requests that we require all broadcast stations to run announcements reminding the viewing public that: (1) excessive television viewing has negative health, academic, and other consequences for children; and (2) parents and guardians retain and should exercise their First Amendment right and ability to turn off their television sets and limit their children's viewing time.[1297] We dismiss this request because it is outside the scope of this proceeding, which

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[1296] *Notice*, 17 FCC Rcd at 18520, 18521 ¶ 49.

[1297] TV-Turnoff Comments at 1-8.

reviews our structural broadcast ownership rules pursuant to Section 202(h). Indeed, the goals sought to be advanced by the proposal bear no relation to diversity, competition, or localism.

625. *PEG.* Alliance requests that we promulgate behavioral regulations that guarantee public, educational, and governmental ("PEG") access on cable and direct broadcast satellite ("DBS") to ensure diversity of voices. Alliance argues that such federal regulations are necessary because PEG access is not mandated by federal legislation, but rather derives from a statute that allows local communities to regulate it.[1298] We dismiss Alliance's request as outside the scope of this proceeding and our authority, generally. The Commission once had access requirements of the type suggested by Alliance, but the Supreme Court struck them down as beyond our statutory authority.[1299] Section 611 of the Act, as amended by the Cable Communications Policy Act of 1984, states that franchising authorities may require operators to designate channel capacity for public, educational and governmental access use as part of their franchise agreement.[1300] Congress did not authorize the Commission, however, to implement, enforce, or oversee the broad local access requirements advocated by Alliance.[1301] We note, however, that noncommercial educational television stations may request mandatory carriage on cable systems[1302] and also have satellite carriage rights in markets where DBS

[1298] Alliance Comments at 4-6. 47 U.S.C. § 542(c)(2).

[1299] *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (authority to compel cable operators to provide common carriage of public-originated transmissions must come specifically from Congress). *Id.* at 708.

[1300] 47 U.S.C. § 531.

[1301] Although DBS is required to set aside 4% of capacity for public interest ("non-commercial, educational, and informational") programming pursuant to Section 335 of the Act, we do not have authority to adopt the broader rights advocated. 47 U.S.C. § 335(b) and 47 C.F.R. 25.701.

[1302] 47 U.S.C. § 535.

provides local-into-local service pursuant to the "carry-one-carry-all" requirements under Section 338 of the Act.[1303]

626. *Payola.* Future of Music Coalition alleges that a new form of payola exists in which record companies pay independent promoters to ensure that the companies' records are played on the radio. The independent promoters, Future of Music Coalition alleges, then establish exclusive relationships with radio stations and pay these radio stations a large portion of the money received from the record companies in the form of "promotional expenses." Future of Music Coalition asks that we ban this practice, thereby promoting diversity in radio programming.[1304] We dismiss Future of Music Coalition's request because it is outside the scope of the *Notice* and this proceeding.

2. Ownership Issues Outside the Scope of the Proceeding.

627. Some parties request action regarding ownership or attribution issues that were not raised in the *Notice* and that are therefore outside the scope of the proceeding.[1305] We dismiss these requests.

628. *Alien Ownership.* CanWest suggests that our biennial review of media ownership rules and the multilateral trade in services negotiations underway in the World Trade Organization provide a timely occasion to review foreign ownership rules for broadcasting.[1306] We decline to undertake such a review because it would be outside the scope of this

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[1303] 47 U.S.C. § 338.

[1304] Future of Music Coalition Comments at 91-92.

[1305] We decline to engage in a far reaching inquiry into possible harms in markets that are outside the Commission's jurisdiction or outside the scope of this proceeding. *See, e.g.*, Jennifer Poole Comments at 1-2 (arguing that consolidation will lead to a loss of pay and benefits for editorial writers).

[1306] CanWest Comments at 8-10.

proceeding. Moreover, to the extent that our foreign ownership regulations are statutorily based,[1307] we do not have the discretion to modify or repeal them in the biennial review process, pursuant to Section 202(h).

629. *Attribution.* MMTC asks us to expand this proceeding to include review of the attribution rules.[1308] We deny this request because, as we stated in the *Notice*, the attribution limits are not properly reviewed in the biennial review process,[1309] except for review of radio joint sales agreements ("JSAs"), which we address in the Local Radio Ownership section above.[1310]

630. *LPFM.* REC Networks requests that we refrain from changing our Low Power FM ("LPFM") rules relating to ownership caps and assignment of stations because these rules are consistent with our intentions in establishing LPFM.[1311] LPFM ownership and assignment rules are addressed in Sections 73.855, 73.858, 73.860, and 73.865 of the Commission's rules, adopted in 2000,[1312] and are not addressed in the context of this proceeding. These are non-commercial

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[1307] 47 U.S.C. § 310.

[1308] MMTC Dec. 9, 2002 Comments at 4.

[1309] The attribution rules do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under the ownership rules. The focus of the biennial review process is whether the ownership rules are necessary in the public interest as a result of competition. The attribution limits are set at the level the Commission believes conveys influence or control and, as these limits are not related to any changes in competitive forces, they are not reviewed biennially. *Notice* at n.13. *See 1998 Biennial NOI*, 13 FCC Rcd at 11280 ¶ 10.

[1310] As addressed more fully in our Local Radio Ownership section above, in 2001, we sought comment on whether JSAs should be attributable. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894 ¶¶ 82, 83. That NPRM was incorporated into this proceeding.

[1311] REC Networks Comments at 2-4.

[1312] 47 C.F.R. §§ 73.855, 73.858, 73.860, 73.865. *See Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000).

stations and therefore a consideration of ownership limits for these stations is outside the scope of this proceeding. REC also asks that we impose new ownership restrictions on non-commercial educational stations. We dismiss that request as such limits are outside the scope of this proceeding.

631. *Broadcast Auction Process.* Hodson recommends that we modify the new entrant bidding credit in the broadcast auction process from the current percentages of 25 percent and 35 percent to 30 percent and 45 percent. Hodson also recommends, in its proposed 30 percent tier, that we allow an attributable interest in five mass media facilities nationwide instead of the current three, with the condition that the winning bidder has no attributable interest in a broadcast presence already in the market the proposed broadcast station intends to serve. Finally, for entities eligible for Hodson's proposed 45 percent tier, Hodson recommends that we establish a relaxed payment plan for the winning bid balance that would include an extended payment schedule.[1313] Hodson's proposals go to our broadcast auction rules and process, not our ownership rules. These proposals are not a logical outgrowth of the *Notice* and they are therefore outside the scope of this proceeding.[1314]

[1313] Hodson Reply Comments at 75-81; Hodson IRFA Comments, MM Dkt. No. 01-317, MM Dkt. No. 00-244, Feb. 28, 2002 at VII.

[1314] We addressed the broadcast auction process in a prior rulemaking proceeding. In 1998, the Commission determined that it would fulfill its obligations under Section 309(j) of the Communications Act of 1934, 47 U.S.C § 309(j)(3)(B), to promote economic opportunity and competition for designated entities, including small businesses, by providing new entrant bidding credits. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15992-97 (1998), *granted in part and denied in part*, 14 FCC Rcd 8724 (1999), *amended by* 14 FCC Rcd 14521 (1999). Changes to these bidding credits would require a separate rule making.

3. Translator/Spectrum Issues Outside the Scope.

632. REC also makes other requests involving our rules applying to use of translators. REC claims that the current rules allow distant translators and discourage establishment of new local LPFM stations.[1315] Nickolas Leggett asks that we provide alternative opportunities to small broadcasters including: (1) a frequency band for manually operated low-power commercial broadcasters; (2) a citizens broadcasting band; and (3) open-microphone neighborhood broadcasting supported by the consolidated broadcasters.[1316] We deny these requests that we change our translator rules or afford spectrum to small broadcasters because they are outside the scope of the proceeding.

B. Proposals Addressed in Other Commission Proceedings.

633. *Cable Ownership.* CCC requests that we retain our 30% national cable system ownership limits.[1317] We dismiss CCC's request because it is outside the scope of this proceeding and it relates to an issue that is the subject of a separate rulemaking.[1318]

634. *DTV.* USCCB asks us to promulgate regulations that define digital television ("DTV") broadcasters' public interest obligations.[1319] We dismiss USCCB's request because it is outside the scope of this proceeding. CST requests that we amend or eliminate any of our rules that hinder the digital conversion of broadcasters, cable systems, and telephone systems, and that we establish regulatory policies to encourage

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[1315] REC Networks Comments at 2-4.

[1316] Nickolas Leggett Oct. 28, 2002 Comments at 5.

[1317] CCC Comments at 24.

[1318] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001).

[1319] USCCB Reply Comments at 1-13.

the introduction of digital technologies.[1320] We dismiss CST's requests because they are outside the scope of this proceeding.[1321] Further, CST proposes that all broadcast licensees and cable systems that expand their operations as a result of rule relaxations be required to loan a percentage of their expansion revenues to a Digital Conversion Fund.[1322] We decline to adopt CST's proposal because there is no basis for the Commission to directly fund industry's transition to digital television. When Congress established the framework for the digital television transition in the Telecommunications Act of 1996, it gave no indication that the Commission should directly fund industry transition costs for digital television. Even if CST's proposal fell within Congress's directives, the establishment of such a fund raises extraordinarily complex and controversial issues such as the measurement by the Commission of 'merger efficiencies' and how the fund would be administered. CST provides us with no meaningful basis to assess the viability or effectiveness of such a program. Finally, as explained in Section VI above, the Commission already has considered the relationship between local television

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[1320] CST Reply Comments at 4-5.

[1321] The Commission is undertaking a second periodic review of the progress of the transition to DTV. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 18 FCC Rcd 1279 (2003). This *Notice of Proposed Rulemaking* seeks additional comment from the public to refresh the record in three outstanding DTV public interest rulemaking proceedings: *Notice of Inquiry, Public Interest Obligations of TV Broadcast Licensees*, 14 FCC Rcd 21633 (1999); *Notice of Proposed Rule Making, Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 15 FCC Rcd 19816 (2000); and *Notice of Proposed Rule Making, Children's Television Obligations of Digital Television Broadcasters*, 15 FCC Rcd 22946 (2000). The second DTV periodic review *Notice of Proposed Rule Making* also seeks comment on a large number of issues related to the progress of the DTV transition and steps the Commission could take to facilitate the transition.

[1322] CST Reply Comments at 7.

consolidation and the transition to digital television. We determined that the efficiencies from relaxing the local television ownership limit would likely promote the transition to digital television.

C. Requests That We Delay the Proceeding or Seek Further Information

635. Some parties ask us to undertake additional studies or delay taking action until after some future events.[1323] We decline to delay action in this proceeding. Our statutory obligation is to review the rules biennially; we have no discretion to willfully deviate from that schedule.

636. *IBOC-DAB*. VCPP requests that there be no relaxation on ownership restrictions until several years after 100% rollout of In Band On Channel Digital Audio Broadcasting ("IBOC-DAB"), arguing that this technology will destroy competition.[1324] We deny VCPP's request. The courts require us to base our ownership decisions on today's marketplace and

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[1323] MMTC filed a motion requesting that we postpone our vote on this *Order*. MMTC argues that because our Electronic Comment Filing System ("ECFS") was overloaded with filings immediately prior to our June 2, 2003 vote, the record does not accurately reflect all comments received in this proceeding and, therefore, parties are unable to respond to the complete record. MMTC Motion for a Brief Postponement of the Vote (May 31, 2003). We deny the motion. The Reply Comment period closed Feb. 3, 2003, more than four months ago. Nonetheless, in the interests of assembling a full record, the Commission has continued to accept comments, and more than 500,000 comments were filed in this proceeding, many of which were filed at the last minute. Given the large volume of last minute filings, it is inevitable that a small percentage would not be placed on our ECFS system or be available in the public reference room in sufficient time for replies. Nonetheless, the record is complete, and MMTC's failure to file its comments or requests in a timely fashion is no excuse to delay the proceeding. Nickolas Leggett asks us to engage in detailed political science analysis of the impact of removal of ownership caps on the legitimacy of government and business. Nickolas Leggett Nov. 15, 2002 Comments at 4. We deny this request because it is unclear.

[1324] VCPP Comments at 1-2.

the facts presently before us. We are not free to adopt a "wait and see" approach.[1325] The impact of IBOC-DAB on diversity, competition, and localism in local media markets will be accounted for in future biennial reviews.

637. SBA asks us to issue a Further Notice of Proposed Rulemaking in this proceeding, claiming the *Notice* is not specific enough to comply with the Administrative Procedure Act or the Regulatory Flexibility Act.[1326] We disagree with SBA and deny its request. Contrary to the implication of SBA, the actual rules at issue in this proceeding are specifically identified in the *Notice* and well known to all interested parties – they are our current broadcast ownership rules. Congress has directed us to review those rules every two years to determine whether those exact rules remain necessary in the public interest. That we have done in this proceeding in accordance with the *Notice*. Further, Congress directed the Commission to eliminate or modify any of its broadcast ownership rules that no longer are necessary. Again, it was explicit in the *Notice* that we might eliminate any rule that could not be justified in light of the current media marketplace. To the extent that we have eliminated rules herein, therefore, there has been no failure of notice. With respect to those rules that, having been found unnecessary, have been modified herein, the question is the familiar one – were the modifications a "logical outgrowth" of the issues identified in the *Notice*. We conclude that this *Order* and its accompanying rules are a logical outgrowth of the questions posed in the *Notice*. The modifications made herein are consistent with the issues and questions posed in the *Notice*, and take account of the full record in this proceeding. Finally, we take seriously the mandate of Section 202(h) to review our broadcast ownership rules every two years. It would be impractical to complete such a Herculean task, in this case, to

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[1325] *Fox Television*, 280 F.3d at 1042.

[1326] SBA March 13, 2002 Comments at 2-5; SBA April 9, 2003 Comments at 3-5.

review six different rules, and to complete that review in time to start another review, if we issued a separate notice detailing modifications to rules and initiated another comment period.

638. Children Now asks that we reserve our decision-making on media ownership until its research on the effects of media consolidation on children is complete and can be incorporated into our record.[1327] Laura Smith requests that we expand the scope of our public hearings on media ownership and that we conduct additional research before concluding this proceeding.[1328] We decline to further delay this proceeding. The public, industry, and government agencies alike have an interest in finality, economy, and the avoidance of unnecessary delay. The public is not served by bureaucratic inaction; industries suffer when rules that restrain behavior without cause continue in force; and agencies fail in their responsibility when they commit public resources to meaningless exercises of no decisional significance. As a corollary, agencies should not refrain from acting on an issue once a robust record has been developed. It is the agency's responsibility, in the first instance, to determine when that point has been reached.[1329]

639. In this case, we see no overriding need to augment the record, nor do we believe that the expenditure of additional time and resources in an effort to do so will provide us with a

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[1327] Children Now Comments at 1-2. Also, on May 21, 2003, Children Now issued a study finding that, in the Los Angeles, California DMA, the number of hours of children's programming aired by television broadcast stations decreased by more than 50% between 1998 and 2003, and that the largest decreases in programming hours occurred at commonly owned stations. *See* Section VI *supra* for a discussion. *Children Now Report* 2, 5-6, 9.

[1328] Laura Smith Reply Comments at 27-33.

[1329] *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980) (en banc) ("Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission .... To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay.").

significantly more accurate or current assessment of the media markets. To the contrary, the record in the current proceeding is one of the most factually complete and thorough ever assembled in a Commission rulemaking. In addition, the court in *Fox Television* made it quite clear that regulatory delay in the biennial ownership review process is causing hardship to the parties and should not be tolerated.[1330] Accordingly, we deny the requests of Children Now and Laura Smith.[1331]

D. Independent Producers.

640. *Independent Production Rules.* The Coalition for Program Diversity ("CPD") asks us to take "content neutral action" by "adopting a 25% Independent Producer Rule that will insure [*sic*] that the prime time programming aired by the four networks is as diverse as possible."[1332] In a similar vein, the Writers' Guild of America ("WGA") proposes a requirement that broadcast and cable national program services purchase at least 50 percent of the entertainment for their prime time schedules from independent producers.[1333] In essence, CPD and WGA ask us to re-impose some version of our prior financial interest/syndication rules, first adopted by the Commission in 1970.[1334] We reject these requests (collectively, the "Fin/Syn Proposals").

641. To begin with, there is substantial doubt as to whether we have adequate notice to adopt the Fin/Syn Proposals. In the *Notice*, we invited comment on, among other issues, whether

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[1330] *Fox Television*, 280 F.3d at 1039 ("retention of the Rules in the interim significantly harms both the networks and Time Warner").

[1331] We address other requests of Children Now *supra*.

[1332] CPD Comments at i, 8-10, 34-37; Reply Comments of CPD at 9; *see also* Malla Pollack Comments at 2.

[1333] Joint Comments of Writers Guild of America, et al., at 3.

[1334] Ex Parte Filing of ABC, Disney, FOX, NBC, Viacom (Apr. 29, 2003) at 1 (referencing *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382 (1970)).

diversity could be better promoted by alternatives to structural regulation, such as behavioral requirements and, if so, what behavioral requirements would be recommended.[1335] The Commission also sought comment on whether "the effects of the 1996 change in the national ownership cap [can] be separated from the effects of the repeal of the fin/syn and [prime time access] rules?" The Commission asked commenters to identify those effects.[1336]

642. Although we invited comment as to whether we should, in lieu of structural rules, adopt behavioral rules to serve our public interest goals, we did not propose a re-imposition of the fin/syn rules, or anything related. The Fin/Syn Proposals, therefore, are not squarely within the four corners of our *Notice*. Moreover, to the extent that we asked general questions about the effect of the repeal of our former fin/syn rules, or whether some behavioral rules might obviate structural regulation, we did not intend, nor do we think the *Notice* can be fairly read to suggest, that a fin/syn overlay would or could substitute for structural regulation as a means of protecting our desiderata -- localism, competition, and diversity. Accordingly, we do not believe that the Fin/Syn Proposals are responsive to the *Notice*, or that the adoption of such rules could be thought to be a logical outgrowth of the *Notice*.

643. In any event, we are not inclined to adopt the Fyn/Syn Proposals. The original fin/syn rules prohibited a television network (defined at the time to include only ABC, NBC, and CBS) from syndicating television programming in the U.S., or from syndicating outside the U.S. programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication. These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition,

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[1335] *Id.* ¶ 49.

[1336] *Id.* ¶ 141.

distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network stations.[1337] In 1983, the Commission proposed repealing the rules based on, *inter alia*: (i) a 44% increase in the number of TV stations available to the average viewer since 1970; (ii) the dramatic increase in the availability of cable television; and (iii) evidence of vigorous competition among the television networks.[1338]

644. In 1991, however, the Commission opted not to repeal the rules, but instead modified them. Among other things, the Commission imposed a new restriction on networks, which provided that "no more than 40 percent of a network's own prime-time entertainment schedule may consist of programs produced by the network itself."[1339] In 1992, the U.S. Court of Appeals for the Seventh Circuit vacated the rules.[1340] The Court criticized the Commission for not addressing earlier Commission findings, in 1983, that the networks lacked significant market power. The Court found that the development of cable, video recorders, and the advent of the Fox network buttressed the earlier findings.[1341]

645. In the proceedings on remand, the Commission decided to repeal, on a graduated basis, most of its fin/syn rules.[1342] In repealing the 40 percent cap, the Commission observed that the cap does not necessarily foster diversity.[1343] The Commission also noted that "the decline in network audience share, which

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[1337] *Schurz Communications, Inc*, 982 F.2d at 1045.

[1338] *Amendment of the Syndication and Financial Interest Rules*, 94 F.C.C.2d 1019, 1057-63 (1983).

[1339] *Schurz Communications*, 982 F.2d at 1046.

[1340] *Id.* at 1055.

[1341] *Id.* at 1046, 1053.

[1342] *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282 (1993).

[1343] *Id.* at 3299 ¶ 38.

largely explained the rule's relaxation in 1991, has continued unabated."[1344] On appeal, the Seventh Circuit affirmed that decision, stating that if the Commission ever decided to re-impose similar fin/syn restrictions on the networks, "it had better have an excellent, a compelling reason" to do so.[1345]

646. In 1995, the Commission removed the remaining fin/syn restrictions, finding that there was no "clear trend toward increased network ownership of [prime time entertainment programming] that is attributable to the relaxation of our fin/syn rules or that constitutes a cause for concern from a public interest standpoint."[1346] At the time, independent producers provided 80.97% of the prime time programming hours for ABC, CBS and NBC.[1347] Although there had been a decline in the number of packagers of programming included in the prime time schedules for ABC, CBS and NBC, the Commission believed that the decline could not be attributed to elimination of the fin/syn rules, but was "instead attributable to the inherent riskiness of prime time programming."[1348] Moreover, ABC, CBS, and NBC faced more, rather than less, competition in broadcast television due to the emergence of FOX and two additional broadcast networks (United Paramount and Warner Brothers).[1349] The Commission also reaffirmed its finding in 1993 that alternative video delivery systems, such as DBS and wireless cable, provided sufficient competition to the broadcast networks to obviate fin/syn restrictions.[1350]

[1344] *Id.* at 3303 ¶ 44.

[1345] *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994).

[1346] *Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 ¶ 21 (1995).

[1347] *Id.*

[1348] *Id.* at 12169 ¶ 20.

[1349] *Id.* at 12170 ¶ 26.

[1350] *Id.* at 12171 ¶ 27.

647. CPD now argues that, despite the growth of cable and DBS providers in the video programming distribution market, there still is a strong public interest supporting limitations on network programming because 43 million consumers receive only broadcast network television.[1351] CPD also points out that in 1992, 66.4 percent of the networks' prime time schedule consisted of programs produced and owned by independent producers. Today, they argue, only 24 percent of the four largest networks' prime time schedule is supplied by independent producers.[1352] CPD argues that the Commission should preserve 25 percent of the networks' prime time schedule for independent producers.

648. WGA asks that the Commission "adopt measures designed to insure [*sic*] that national program services on broadcast and cable television purchase at least 50% of their prime time programming from independent producers."[1353] WGA contends that consolidation in the market for video programming makes any appearance of diversity a mirage. Although there are 230 national cable programming networks, according to WGA, there are just 91 networks that can be considered major networks (defined by WGA as available in more than 16 million homes). Of these 91 networks, 80 percent (73) are owned or co-owned by 6 entities: AOL Time Warner, Viacom, Liberty Media, NBC, Disney and News Corporation.[1354]

649. Four major networks (ABC, CBS, FOX, and NBC, collectively the "Networks") filed a joint ex parte pleading opposing any cap on the amount of network programming a network may air during prime time. The Networks invoke much of the rationale that the Seventh Circuit used when it

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[1351] CPD Reply Comments at 2.

[1352] *Id.* at 4.

[1353] WGA Comments at 3.

[1354] *Id.* at 10.

vacated the Commission's prior fin/syn rules.[1355] To those arguments, the Networks add that the broadcast networks' prime time audience share has dropped from 72 percent in 1993-1994 to 58.9 in 2001-2002.[1356] The Networks assert that CPD's argument ignores the fact that, whereas there were only three broadcast networks in 1970 when the Commission first adopted the fin/syn rules, there are now seven networks providing English language programming.[1357] The Networks also argue that the growth in use of the DVD player, personal video recorder, and the Internet continues to add to the diversity in video programming and continues to undermine any rationale for fin/syn rules.[1358] Even accepting WGA's assertion that six companies own many of the major cable networks, the Networks argue that the market for video programming is more diverse today because six is double the number of companies that owned broadcast networks when the fin/syn rules were adopted.[1359]

650. Although CPD and WGA appear to be correct that fewer of the programs in the Networks' prime-time lineup are produced by independent producers than at times in the past, the evidence in the record does not address whether the decline in the number of independently-produced programs is attributable to changes in the regulatory environment (*i.e.*, the elimination of the fin/syn rules) or to other changes that have taken place in the media business in the intervening years that have increased the risk of producing prime time programming.[1360]

[1355] ABC, NBC, Disney, Fox and Viacom Apr. 29, 2003 Ex Parte at 2-3.

[1356] *Id.* at 2-5.

[1357] *Id.* at 2-8.

[1358] *Id.* at 2-7.

[1359] *Id.*

[1360] "Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of

651. Moreover, the reduction in independently produced prime time programming on a small subset of television networks is not, by itself, a public interest harm. Our concern is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers. The record does not demonstrate that consumers and viewers are harmed as a result of network financial interests in the programming they carry, particularly in light of the quantity and variety of media outlets for programming in today's media marketplace.

652. In particular, the record does not convince us that an "access" rule for independent producers will advance viewpoint diversity. CPD's argument, for example, is premised on the notion that the Networks are gatekeepers;[1361] if they are not, there are other outlets for independently-produced fare and no basis to impose fin/syn restrictions. To the extent that the Networks actually are gatekeepers, however, fin/syn rules cannot logically advance viewpoint diversity because the Networks, as gatekeepers, can filter messages at the distribution stage just as they can at the production stage. Adopting the Fin/Syn Proposals, therefore, is not likely to promote viewpoint diversity.

653. Even if we were to adopt a broader definition of "diversity" to include general entertainment programming,[1362] a

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the television industry has changed profoundly." *Schurz Communications*, 982 F.2d at 1046. The Commission previously has questioned whether changes in the mix of programming on the prime time lineup can be attributed to regulatory changes or to business considerations. *See Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd 12165 ¶ 20 (1995).

[1361] Ex Parte Filing of CPD (May 15, 2003) at 2.

[1362] Although CPD premised its proposal on the goals of promoting both source diversity and program diversity, its main arguments appear to be premised on a program diversity rationale. *See, e.g.*, CPD Reply Comments at 20 (arguing that its proposal would "substantially increase the possibility that more diverse genres of programming will emerge"). As discussed

gatekeeper at distribution still may filter unwanted programming whether or not the programming is produced in-house. For example, if a network were to decide that its prime time lineup should consist only of "reality programming," or that it should target a particular audience demographic, there is no reason to believe that it could not give effect to those plans with independently-produced programming as easily as it could with programming produced by itself or an affiliated company – it simply would make known its programming intent and allow independent producers to fill the void. The Fin/Syn Proposals, therefore, cannot be justified on grounds of programming diversity.

654. Both CPD and WGA also fail to justify their definitions of the relevant market for purposes of their proposals. CPD, for example, has targeted its proposal only at the four major broadcast networks, and only at their prime time schedule. However, aside from conclusory allegations that "the prime time television programming marketplace is a narrow, unique market,"[1363] CPD has provided no reason to exclude other video programming outlets and other day-times, were we inclined to adopt a fin/syn-like rule. Viewers today have more programming choices available to them over-the-air, through cable, satellite, or home video, than ever before.[1364] Indeed, WGA considers a much larger market for these purposes (although it, too, provides little in the way of support for its market definition), and other commenters have suggested that non-prime time broadcast hours should be included in any

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above, our core interest in this proceeding is in protecting viewpoint diversity; we generally rely upon market forces to deliver programming that will appeal to viewers.

[1363] CPD Comments at 3-4.

[1364] *See* Joint Comments, Bruce M. Owen and Michael G. Baumann, Economic Study E, *Concentration Among National Purchasers of Video Entertainment Programming*, at 2.

analysis relating to programming diversity.[1365] Lacking the foundation of a sustainable market definition, the Fin/Syn Proposals cannot stand.[1366]

655. Finally, to the extent that the Fin/Syn Proposals are based on an assertion that the quality of independently-produced entertainment programming is superior to that of the Networks,[1367] we find the record devoid of evidence to that effect.[1368] We have no means or methodology to measure the quality of entertainment programming, and were we to favor one type or genre of programming over another, we would run squarely into the teeth of the First Amendment.[1369] It is up to consumers and viewers to determine what programming they want to watch, and networks, as they compete for viewers, must be responsive to those demands. It is not for this agency to intervene in the decisions that determine the content of programming (absent obscenity or indecency concerns).

656. When the Seventh Circuit affirmed the Commission's decision repealing all of the fin/syn rules, it questioned whether the rules "ever had much basis" and cautioned that, if the Commission ever decided to re-impose similar restrictions, "it had better have an excellent, a compelling reason" to do so.[1370]

[1365] NASA Comments at 63-64 (arguing that the 35% national cap should be retained to promote programming diversity during non-prime time).

[1366] *See Review of the Syndication and Financial Interest Rules*, 10 FCC Rcd at 12171 ¶ 27 (concluding that the fin/syn rules focused too narrowly on the broadcast networks to the exclusion of other distribution channels).

[1367] *E.g.*, CPD Reply Comments at i, 6, 13; WGA Comments at 10.

[1368] *Cf.* MOWG Study No. 5, Program Diversity and the Program Selection Process on Broadcast Network Television by Mara Einstein (Sept. 2002).

[1369] To be considered content-neutral, regulations must have neutral means and ends. *See News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (strict scrutiny applied to structural regulations that had a direct effect on content and viewpoint); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (invalidating EEO regulations under strict scrutiny to the extent that they would implicate programming content).

[1370] *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994).

None appears on this record. Accordingly, we reject the Fin/Syn Proposals.[1371]

IX. NOTICE OF PROPOSED RULEMAKING

657. In the Local Radio Section of this *Order*, we replaced our current contour-overlap methodology for defining radio markets with a geography-based market definition. For areas of the country covered by Arbitron Metro markets, we adopted the Metro market as the relevant radio market for purposes of determining compliance with the local radio ownership rule. A significant portion of the country, however, is not covered by Metro markets. We initiate this rulemaking proceeding to define radio markets for those areas.

658. We seek comment on how to draw specific market boundaries in areas of the country not located in Arbitron Metros. What factors should we consider in grouping radio stations into markets? We propose that radio markets be county-based, as Arbitron Metros are. We seek comment on that proposal. In the western United States, counties are significantly larger. We seek comment on whether we should, like Arbitron, divide counties into separate radio markets in certain circumstances. We also propose that radio stations be assigned to radio markets based on the location of their communities of license. We seek comment on this proposal.

659. We seek comment on whether we should rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. As indicated in the Local Radio Section, Arbitron traditionally has based its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. Should we also do the same for non-Metro areas? OMB recently released new MA definitions based on the results of

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[1371] Aside from the reasons enumerated above, we reject WGA's proposal because it is far from clear that the Commission has jurisdiction over the programming carried on cable networks.

the 2000 Census.[1372] The 935 new MAs, moreover, cover a greater portion of the country. Previously, MAs were defined only for urban areas with a population of 50,000.[1373] The new MA definitions cover areas with a population of 10,000 to 50,000 (known as Micropolitan Statistical Areas), which should greatly increase the number of radio stations located in MAs.[1374] If we rely on MAs, how should we address future changes to MA definitions, and the creation of a new, or the deletion of an existing, MA?[1375] In addition, even with the expanded reach of the new MAs, there will be areas that they do not cover. How should the radio market be defined in those areas if MAs are used? One possible method is to establish geographic markets based on the location, distribution, and density of populated areas.[1376] Because population clusters are likely to indicate areas of economic and social interaction, the location and distribution of the centers of population should give us a reasonable indicator of the boundaries of the relevant geographic market in which radio stations compete. Because the geographic areas involved generally will be low-density and rural areas of the country, moreover, we believe that population data could provide a fairly reliable and easily determinable

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[1372] See OMB - Bulletin No. 03-04, http://www.whitehouse.gov/omb/omb/bulletins/b03-04.html. In 2000, OMB revised its procedures for defining MAs. In addition, it adopted the more generic term Core Based Statistical Area (CBSA) to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas. *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). Although less accurate, we will use former term – i.e., MAs – to avoid confusion.

[1373] *See* U.S. Census Bureau, Cartographic Boundary Files, http://www.census.gov/geo/www/cob/ ma_metadata.html (visited May 30, 2003).

[1374] *See* 65 Fed. Reg. at 82236-37 for a detailed description of the standards OMB uses to define MAs.

[1375] See *id.* at 82237 for the rules governing future updates to MAs.

[1376] Population data is available over the Internet from the Census Bureau.

market definition. We seek comment on this and any other methods.

660. Another possibility is to treat Cellular Market Areas (CMAs) as the relevant geographic market for radio. CMAs were developed in the mid-1980s to be the geographic basis for licensing cellular spectrum. CMAs consist of MAs (as they were defined after the 1980 census) and Rural Service Areas (RSAs),[1377] which the Commission delineated for areas of the country not located in MAs.[1378] Although CMAs were not developed in the context of radio broadcasting, they were designed to follow "natural social and economic communities" through "multi-county groupings drawn along . . . county boundaries."[1379] Are CMAs a reasonable proxy for radio markets in non-Metro areas of the country? We seek comment on this issue.

661. For any market definition we establish, how should we address situations in which that market overlaps an Arbitron Metro. If we use MAs or CMAs, there will be existing areas of overlap. Even if we define radio markets around existing Arbitron Metros, Metro boundaries may change, or Arbitron may create or delete a Metro. We seek comment on how to address the possibility of a market overlap (or in the case of a deleted Metro, the possibility of an undefined market).

662. The goal of this rulemaking proceeding is to generate a map or a list of markets for radio stations across the entire country, using Arbitron Metros where available and a Commission-endorsed market definition everywhere else. We therefore encourage parties to use this opportunity to submit specific information that would assist is in properly delineating

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[1377] *See Amendment of the Commission's Rules for Rural Cellular Service*, 1985 WL 260366, FCC 85-646, ¶ 1 (rel. Dec. 17, 1985).

[1378] *Amendment of the Commission's Rules for Rural Cellular Service*, 60 Radio Reg. (P&F) 1029, ¶ 1 (1986).

[1379] *Id.* at ¶ 11.

the boundaries of the local radio markets in which they are interested.

663. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[1380] interested parties may file comments on the notice of proposed rulemaking on or before 30 days after date of publication in the *Federal Register*, and reply comments on or before 45 days after date of publication in the *Federal Register*. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

664. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket, which in this instance is MB Docket No. 03-130. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at

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[1380] 47 C.F.R. §§ 1.415 and 1.419.

this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

665. Parties must also serve either one copy of each filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each filing via email or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S.W., 2-C134, Washington, D.C., 20554. Parties should serve one copy of each filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W., 2-C438, Washington, D.C., 20554.

666. *Availability of Documents.* Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267, (202) 418-7365 TTY, or bcline@fcc.gov. These documents also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, S.W., Room, CY-B402, Washington, D.C., 20554, telephone (202) 863-

2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

667. *Ex Parte Rules.* This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[1381] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[1382] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Secretary, Marlene H. Dortch, at the appropriate address as shown above for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve either one copy of each ex parte filing via e-mail or two paper copies to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com. In addition, parties should serve one copy of each ex parte filing via email

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[1381] 47 C.F.R. § 1.1206(b).

[1382] *See id.* § 1.1206(b)(2).

or one paper copy to Amy Brett, Media Bureau, 445 12th Street, S.W., 2-C134, Washington, D.C., 20554. Parties should serve one copy of each ex parte filing via email or five paper copies to Linda Senecal, 445 12th Street, S.W., 2-C438, Washington, D.C., 20554.

668. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1383] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the *Notice of Proposed Rulemaking* initiated herein. The IRFA is set forth in Appendix I. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice of Proposed Rulemaking*, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed Rulemaking*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA), in accordance with the Regulatory Flexibility Act.[1384]

669. *Paperwork Reduction Act.* This *Notice of Proposed Rulemaking* contains modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

[1383] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[1384] *See* 5 U.S.C. § 603(a).

670. *Authority*. This *Notice* is issued pursuant to authority contained in Sections 4(i), 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 307, and Section 202(h) of the Telecommunications Act of 1996.

X. ADDITIONAL ADMINISTRATIVE MATTERS

PAPERWORK REDUCTION ACT

671. This *Order* contains both new and modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding.

REGULATORY FLEXIBILITY ACT

672. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[1385] the Commission's Final Regulatory Flexibility Act Analysis is contained Appendix G.

DOCUMENT AVAILABILITY

673. This document is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com. This document is available in accessible formats (computer diskettes, large print, audio recording, and Braille) to persons with disabilities by contacting Brian Millin in the Consumer &

[1385] *See* 5 U.S.C. § 604.

Governmental Affairs Bureau at 202-418-7426, TTY 202-418-7365, or at bmillin@fcc.gov.

XI. ORDERING CLAUSES

674. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Report and Order* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244 IS ADOPTED.

675. IT IS FURTHER ORDERED that Part 73 of the Commission's Rules IS AMENDED as indicated in Appendix H.

676. IT IS FURTHER ORDERED that the Interim Policy set forth herein IS ADOPTED.

677. IT IS FURTHER ORDERED that the Motion for Revision of Procedural Dates, Expansion of the Scope of the Proceeding, and Inclusion of Additional Studies in the Record, filed on October 9, 2002 by Minority Media and Telecommunications Council and National Association of Black Owned Broadcasters, is DENIED in part and GRANTED in part to the extent described herein; the Motion to Bifurcate and Repeal, filed on March 11, 2003 by Media General, Inc., IS DISMISSED; and the Motion to Postpone, filed on May 31, 2003 by the Diversity and Competition Supporters, et al., IS DENIED.

678. IT IS FURTHER ORDERED, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, that the ownership requirements and rules adopted in this *Report and Order* SHALL BECOME EFFECTIVE thirty (30) days after publication of the text or summary thereof in the Federal

Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which SHALL BECOME EFFECTIVE immediately upon announcement in the Federal Register of OMB approval.

679. This action is taken pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996. If any section, subsection, paragraph, sentence, clause or phrase of this *Report and Order* or the rules adopted herein is declared invalid for any reason, the remaining portions of this *Report and Order* and the rules adopted herein SHALL BE severable from the invalid part and SHALL REMAIN in full force and effect.

680. IT IS FURTHER ORDERED THAT the proceedings in MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, and MM Docket No. 00-244 ARE TERMINATED.

681. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

682. IT IS FURTHER ORDERED that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310 and section 202(h) of the Telecommunications Act of 1996, this *Notice of Proposed Rule Making* in MB Docket No. 03-130 IS ADOPTED.

683. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Notice of Proposed*

Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

PRESS STATEMENT OF CHAIRMAN MICHAEL POWELL

In the Matter of the 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.

Today, we complete the most exhaustive and comprehensive review of our broadcast ownership rules ever undertaken. We have done so, obligated by our statutory duty to review the rules biennially and prove those rules are "necessary in the public interest." The Court of Appeals has interpreted this standard as placing a high hurdle before the Commission for maintaining a given regulation, and made clear that failure to surmount that hurdle, based on a thorough record, must result in the rule's modification or elimination. This is an exceedingly difficult charge, but a critical one to fulfill if we hope to continue to promote the cherished values of diversity, localism and competition.

Over the past twenty months we have been working tirelessly towards achieving three critically important goals: (1) Reinstating legally enforceable broadcast ownership limits that promote diversity, localism and competition (replacing those that have been struck down by the courts); (2) Building modern rules that take proper account of the explosion of new media outlets for news, information and entertainment, rather than perpetuate the graying rules of a bygone black and white era; and (3) Striking a careful balance that does not unduly limit transactions that promote the public interest, while ensuring that no company can monopolize the medium. I am confident we succeed by today's Order.

This proceeding has been the subject of extraordinary public attention. It is right that it has been so, for the values these rules are intended to advance are critically important to a vibrant democracy. I have heard the concerns expressed by the

public about excessive consolidation. Though such generalized worries do not clearly suggest specific answers to the specific issues the Commission must address, they have introduced a note of caution in the choices we have made. Consequently, our decisions today—retaining the rule against networks merging, tightening the limits on radio ownership, and modifying, rather than eliminating, the remaining rules—are modest, albeit very significant changes.

I must punctuate one irreducible point: Keeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today's surgery, the rules would assuredly meet a swift death. As the only member of this Commission here during the last biennial review, I watched first hand as we bent to political pressure and left many rules unchanged. Nearly all were rejected by the court because of our failure to apply the statute faithfully. I have been committed to not repeating that error, for I believe the stakes are perilously high. Leaving things unaltered, regardless of changes in the competitive landscape, is a course that only Congress can legitimately chart.

For these reasons, we have embraced a challenge unparalleled in the FCC's history. We collected a thorough record, analyzed our broadcast ownership rules from the ground up, and wrote rules that match the times. For the first time, we documented the state of the entire industry, empirically analyzed different transactions and their effect on our diversity goals, and—most importantly—sought the views of our citizens as to how they obtain their news and public affairs information, in an effort to craft rules consistent with the actual, rather than theoretical, viewing and listening patterns of Americans.

I am confident and proud of the job we have done. I believe that our actions will advance our diversity and localism goals and maintain a vigorously competitive environment.

I would like to express my deep appreciation to each of my colleagues for their tireless efforts over these past many

months. Commissioners Adelstein and Copps have organized numerous hearings throughout the country and deserve credit for bringing unprecedented public input to this proceeding. Commissioners Abernathy and Martin have been actively engaged in every step of the process and have contributed enormously to the Order before us today. I admire the genuine commitment of all four of my colleagues to serving the American public in this proceeding. And, finally, there are not enough words of commendation for the spectacular efforts of the men and women of the Media Bureau. Their dedication and commitment are in the finest traditions of public service.

SEPARATE STATEMENT OF COMMISSONER KATHLEEN Q. ABERNATHY

Re: 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act or 1996, Cross-ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Order and Further Notice of Proposed Rulemaking (adopted June 2, 2003).

Today the Commission faces another historic decision affecting free speech where it must decide whether to be guided by facts or by fears. For literally years, this Commission has struggled in a highly politicized environment through Democratic and Republican administrations to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy — and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. Our success will ultimately be judged not by a public relations assessment, but by the rigorous demands of judicial review. It is a heavy responsibility and I believe we have exercised it well.

I. LEGAL FRAMEWORK OF TODAY'S DECISION

I began my review of the FCC's media ownership rules with three inescapable realities: the Telecommunications Act of 1996, the judicial decisions interpreting it, and the U.S. Constitution.

First, the Act requires the Commission to conduct a review every two years to determine which of our broadcast ownership rules can be justified in the modern world of media. For those who want us to delay this proceeding, I cannot do it. In fact, we are already five months behind schedule and therefore unfaithful to congressional intent.

Second, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. For those who want the Commission to maintain all the rules in their current form, you are asking me to defy the federal courts. This I will not do.

Third, the First Amendment to the Constitution protects the rights of free speech and free press and tells me that, in my capacity as an FCC Commissioner, I cannot tell the American people what they should believe, what they should read, or what they should watch or listen to for their own good. Any restraint placed on broadcasters' free speech rights must be a reasonable means to further our public interest goals. The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence — not on fear and speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people.

Within these parameters, I want to emphasize that we have undertaken an enormous study of the reality of the modern broadcasting marketplace. We have accumulated a record of unprecedented breadth and depth, including hundreds of thousands of public comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. Ken Ferree and the Media Bureau staff have invested countless hours in research and analysis.

II. OWNERSHIP RESTRICTIONS

Based on my review of the record, I am persuaded that several ownership limitations — in their current form or with some modifications — remain "necessary in the public interest"[1] to preserve competition, localism, and diversity.

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[1] Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996); *see also* 47 U.S.C. § 161; Joint Statement of Chairman Michael K. Powell and Commissioner

These rules thus meet the legal standard demanded by Congress and the courts. Rules that do not meet this standard may not be retained.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for other matters such as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms.[2] We have modified these restrictions because, not only do the former rules fail to promote competition, localism, and diversity, but they may actually be *harming* these goals. For example, the record has demonstrated that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages. I emphasize that our restrictions are

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Kathleen Q. Abernathy in *2002 Biennial Regulatory Review*, FCC 02-342, GC Docket No. 02-390, (rel. March 14, 2003) (explaining that biennial review standard in section 11 and section 202(h) is best interpreted as requiring an affirmative justification of covered rules based on the same substantive standard that applies upon adoption of the rules in the first instance).

[2] While I would have preferred to address cross-media mergers in small to middle markets on a case-by-case basis, I support the decisions we reached in this Order. Indeed, bright-line rules have the benefit of providing more certainty to the marketplace and increase the transparency of our process.

grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.[3]

III. FACTS AND FEARS

Those who oppose our decision will continue to fear a mythical media monopoly that will descend upon our media landscape without any regulatory review of its power. But the reality is that under today's order there will continue to be hundreds of pathways into the American home in the average American city or town. The reality is that we are continuing to impose a national television ownership cap in recognition of the important role affiliates play in promoting localism, competition, and diversity. The reality is that today's order will prevent media companies from owning more than one of the top four stations in a market and will similarly forbid consolidation to fewer than six voices in the markets serving the vast majority of Americans. Democracy and civic discourse were not dead in America when there were only three to four stations in most markets in the 1960s and 1970s, and they will surely not be dead in this century when there are, at a minimum, four to six independent broadcasters in most markets, plus hundreds of cable channels and unlimited Internet voices.

Those opposing today's order have also emphasized that four companies air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines. Given these other viewing options, I can only presume that this means that Americans are watching these providers because they

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[3] Moreover, the modification of these prophylactic rules does not strip us of our continuing obligation to review transfers of media licenses to ensure they are consistent with the public interest.

prefer their content, not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming. By the same token, concerns about the degradation of broadcast content do not justify government manipulation of consumer choice. "Degradation" is just an elitist way of saying programming that one does not like. While I support adopting prophylactic regulations in the interest of ensuring that consumers have ample choice — as we have done today — I refuse to pour one ounce of cement to support a structure that dictates to the American people what they should watch, listen to, or think.

III. NEW INITIATIVES

The defining characteristic of today's decision is balance. As I have said, we have undertaken affirmative steps to retain limits on ownership where they can be shown by actual evidence to promote competition, localism, and diversity. We have resisted merely hypothetical fears. In the process of reaching this balance, we have also taken some additional steps.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each station. Accordingly, I am pleased that we have clarified in this Order that commonly owned stations in a market must air distinct children's programming to comply with our rules.

Second, this Order also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned. The Order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for

participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend the Chairman on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

IV. CONCLUSION

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal — national ownership caps that vary by only five percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth — we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules we adopt today, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world. Indeed, the fall of Communism in the 1980's and of military dictatorships in the 1990's shows that diverse viewpoints cannot be suppressed even by authoritarian governments, much less by private media companies.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study of the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on

facts rather than fears. That is what Congress' statute requires, that is what the courts require, and that is what the First Amendment requires.

STATEMENT OF COMMISSIONER KEVIN J. MARTIN ON BIENNIAL REVIEW OF BROADCAST OWNERSHIP RULES

First, I want to congratulate Chairman Powell for his leadership on this issue. He has long advocated his vision for a new media ownership framework. Through his hard work and dedication, we are bringing this proceeding to a close and will finally adopt these proposed new rules.

I also commend Commissioners Copps and Adelstein for their tireless efforts in reaching out to the public, informing them of the issues, and encouraging them to participate in the process. While I ultimately disagree with them on the course of action the Commission should take, I appreciate and respect the contribution they have made to this debate.

The decision we make today is as difficult as it is critical. The media touches almost every aspect of our lives. We are dependent on it for our news, our information, and our entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. In fact, I agree with many of the concerns about consolidation and preservation of diversity that have been expressed by my colleagues this morning.

I also believe, however, that the FCC must respond to congressional and judicial calls to update our rules for the 21st century. We are under a legal mandate to review our broadcast ownership rules and determine whether they are still "necessary" in today's marketplace. If they are not, we must repeal or modify the rules. And according to the courts, this is an obligation that the Commission did not take sufficiently seriously in the past. Indeed, the courts have overturned the last three broadcast ownership rules they reviewed because the Commission did not sufficiently take into account new voices present in the current marketplace.

Therefore, we must analyze today's marketplace. As Congress anticipated and as the courts have ordered us to recognize, the media marketplace is not stagnant. Factors such as rapidly improving technology and innovation have contributed to a media landscape that is continually evolving—and considerably different from the one when most of the broadcast ownership rules were first adopted. I recall having extremely limited choices on our family television set when I was growing up. There was no cable. There was no satellite. Even with our roof antenna, we received just five channels—the three major networks, one independent, and one public television station. Our national news was delivered to us by the three networks for one-half hour, straight from New York City, at the same time every evening. No CNN, FOX, MSNBC, or CNBC. Local news was broadcast by the local stations just once at 6:00 and once at 11:00. And at that time, news from 24 hour local cable channels was far off on the horizon.

While my parents still live in the same house, they now have access to seven broadcast networks, hundreds of digital cable channels (including a local cable news channel), many more radio stations, and thousands of sites on the Internet. Indeed, people today have access to more information from more diverse sources than at any time in our history.

Clearly, the media marketplace has changed significantly since our media ownership rules were first adopted. Yet what has *not* changed is the importance of the three principles our original rules were intended to promote: competition, localism, and diversity. Fundamentally, our rules must still promote competition, localism, and diversity to nourish a vibrant media marketplace.

I am particularly pleased that, for the first time in 28 years, the Order we adopt today finally concludes a review of the newspaper/broadcast cross-ownership rule, which has prohibited a company from owning a newspaper and broadcast station in the same market. Adopted in an era with little cable

penetration, no local cable news channels, few broadcast stations, and no Internet, the rule was based on a market structure that bears almost no resemblance to the current environment. Indeed, because of these marketplace changes, we have revised all our other media rules at least once since the ban's adoption. As a result, newspapers have been the *only* media entities prohibited from owning a broadcast station in the markets they serve, regardless of how large the market was or how many newspapers or broadcast stations were present. For example, in the large markets, two broadcast television stations have been permitted to combine and could own up to six radio stations, as well. Yet, newspapers remained prohibited from owning even a single radio station. Today we correct this imbalance, finally giving newspapers the same opportunities other media entities enjoy in medium and large markets. In so doing, we recognize that newspaper/broadcast combinations may result in a significant increase in the production of local news and current affairs, as well as an improvement in the quality of programming provided to their communities.

I also am pleased that, where the Commission determines that existing rules should be modified, we have crafted simple, clear rules. I remain skeptical of overly complicated mathematical formulas and the uncertainty they can beget in the marketplace.

I appreciate the staff's hard work in developing a diversity index, and I found much of their analysis helpful in informing us of general markets trends. I also appreciate my colleagues' recognition that the diversity index cannot be used in particular transactions. A concept as complex as diversity cannot be quantified with mathematical precision.

Finally, I note that the decision regarding the national ownership cap was particularly difficult. The record contained strong evidence on both sides of this issue. I believe the affiliates made a compelling case as to why a national limit needs to be retained. I agree that a balance between the

affiliates and the networks is important to maintaining localism, and thus I did not support proposals in the record to eliminate the cap altogether. Yet, the networks also made persuasive arguments that a 35% cap is not necessary—in particular, that we do not have sufficient evidence to conclude that the two networks currently reaching over 40% of the country have caused actual and significant harm today.

The Order we adopt today attempts to respond to the courts' admonitions and our Congressional mandate by recognizing the availability of these new media outlets, evaluating their impact on our core goals, and modifying our rules as appropriate.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS, DISSENTING

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I dissent to this decision. I dissent on grounds of substance. I dissent on grounds of process. I dissent because today the Federal Communications Commission empowers America's new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend.

This morning we are at a crossroads – for the Federal Communications Commission, for television, radio, and newspapers, and for the American people. The decision we five make today will recast our entire media landscape for years to come. At issue is whether a few corporations will be ceded gatekeeper control over the civil dialogue of our country; content control over our music, entertainment and information; and veto power over the majority of what we and our families watch, hear and read.

Two very divergent paths beckon us forward.

Down one road is a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. This path beckons us to update our rules to account for technological and marketplace changes, but without abandoning core values going to the heart of what the media mean in our country. On this path we also reaffirm that FCC licensees have been given very special privileges and that they have very special responsibilities to serve the public interest.

Down the other road is more media control by ever fewer corporate giants. This path surrenders to a handful of

corporations awesome powers over our news, information and entertainment. Here we treat the media like any other big business, trusting that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit for a privileged few. On this path we endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

So the stakes are high – higher than they have been for any decision the five people sitting here today have ever made at this Commission. How do we decide which path to choose?

I start with three principles. First, look at the law and see what Congress instructs us to achieve. Second, look at practical, real world experience rather than cling to some prefabricated mind-set or ideology. And third, when faced with the automatic consequences that will follow such a far-reaching decision, act cautiously rather than rashly, and trust in the wisdom of the American people.

What does the law tell us? The Communications Act tells us, very clearly, to use our rules to promote the public interest, and to that end, for decades we have promoted the goals of localism, diversity and competition. The statute tells us that the airwaves belong to the American people, and that corporations are given a temporary right to use this public asset only in return for their pledge to use it in the public interest. No broadcast station, no company, no single individual owns an airwave in America; the airwaves belong to all the people. The law tells us that the last time Congress legislated on this topic, it thought that restrictions on how big a single media corporation could get and how much power one company could amass were important and necessary. And the Supreme Court has upheld media protections, stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by

the Government itself or a private licensee."[1] Finally, on the larger issue of media power, Judge Learned Hand instructed us that "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country."[2] His words remain true today.

What practical, real world experience do we have to guide us? Radio deregulation gives us powerful and relevant lessons. When Congress and the Commission removed some of the radio concentration protections, we experienced massive, and largely unforeseen, consolidation. Very quickly after taking actions for radio like those we will take today for television and newspapers, there was a 34 percent reduction in the number of radio station owners. Diversity of programming suffered. Homogenized music and standardized programming crowded out local and regional talent. Creative local artists found it evermore difficult to obtain play time on the air. Editorial opinion polarized. Competition in many towns became non-existent as a few companies -- in some cases a single company -- bought up virtually every station in the market. This experience should ***terrify*** us as we consider visiting upon television and newspapers what we have inflicted upon radio. "Clear Channelization" of the rest of the American media will harm our country.

What about seeking out the counsel and trusting in the wisdom of the American people? Begin by realizing that every American has a stake in this decision. ***Every American***, not just the companies that have temporary license to use the public's spectrum. Commissioner Adelstein and I have attended public hearings in many cities across the country. We have met with conservatives and liberals, broadcasters and creative artists, concerned parents and civil rights activists, church leaders and educators. Our Commission has seen a

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[1] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

[2] Learned Hand, Memorial Service for Justice Brandeis, December 21, 1942.

flood of opinions from every state in the nation. Close to three quarters of a million people have registered their views now – more than for any proceeding in Commission history. And in a nation that can be deeply divided on important issues, these citizens are almost unanimous on the question of whether this Commission should allow further media concentration. They are imploring us to protect local broadcasting, diversity of programming and opinion, and the ability to compete with the huge companies. We should heed their conservatism – their urgent call to refrain from abandoning time-honored protections when so much is at stake and so much is unknown about the consequences of what we are doing here today.

The majority instead chooses radical deregulation – perhaps not quite so radical as originally intended a year ago before so much pressure was brought to bear upon them – but radical nevertheless. This decision allows a corporation to control three television stations in a single city. Why does any corporate interest need to own three stations in ***any*** city, other than to enjoy the 40-50 percent profit margins most consolidated stations are racking up? What public interest, what diversity, does that serve? This decision also allows the giant media companies to buy up the remaining local newspaper and exert massive influence over some communities by wielding three TV stations, eight radio stations, the cable operator, and the already monopolistic newspaper. What public interest, what new competition, is enabled by encouraging the newspaper monopoly and the broadcasting oligopoly to combine? This decision further allows the already massive television networks to buy up even more local TV stations, so that they control up to an unbelievable 80 or 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? ***I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition.***

Take away the protections against concentration that still remain and one company could dominate a region's access to information by controlling its radio stations, television stations, newspapers and cable system. Where once it was commonplace to have two, three, or more daily newspapers in a city, today most communities are one-paper monopoly towns. Local broadcast television and radio are both concentrated oligopolies in communities across this country. And the story is not much better on a national level. The conglomerates that own the networks control 70 percent of the prime-time audience. Their audience share of television households is approaching – and could soon surpass according to analysts – the share the three networks had during the 1960s and 1970s. And today, those conglomerates are more vertically integrated, controlling the production of most of their programs as well.

What about the vaunted 500-channel universe of cable TV saving us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they're all owned by the same people, cable doesn't protect localism, editorial diversity, or competition. And those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable. So, how does it promote localism, diversity and competition to allow, as we will allow by our action today, more media concentration in the more than 175 markets with over 90 percent of the American population?

If we were just starting down the road to media concentration, maybe we could have a different kind of discussion today. But we have already traveled dangerously far down that road, and the need now is to slow the headlong rush to media monopoly until someone can prove it is taking the media, and the country, anywhere worth going. This is a huge

and foolhardy gamble with the future – every American's future.

Let us remember that this is only the latest, most radical step in a twenty-year history of undermining the public interest. Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle.

The Commission has allowed fundamental protections of the public interest to wither and die – requirements like ascertaining the needs of the local audience, the Fairness Doctrine, teeing up controversial issues, providing demonstrated diversity in programming, ensuring decent quality programming for our children, to name a few of the safeguards we had once but have abandoned.

At the same time, the Commission has pared back its license renewal process from one in which it examined whether the broadcaster was actually serving the public interest to one where companies need only send us a postcard every eight years and nothing more. Unless there is a major complaint pending against a station, the license is almost automatically renewed.

The Commission cut back on its structural regulations that limited both horizontal (or distributional) concentration ***and*** vertical (or production) concentration, so that the same network distributing programs increasingly owned them. The worst monopolies in American history were built on this model. Then the Commission went further, eliminating outright the vertical safeguards that protected against a few conglomerates controlling all of the creative entertainment that we see.

Over the years, the Commission has dismantled all of these provisions and more, relying instead on marketplace forces as a proxy for serving the public interest. Along the way, make no mistake about it, localism, diversity and competition suffered

grievous wounds. Worse, the heart and soul went out of much of our media. And we are left with only the current rules governing control of ownership structure as a means to safeguard our public interest obligations. They can't do the job by themselves, even if we were to keep them as they are. By emasculating them today, we only make the problem worse. And by neglecting to do justice to proposals that could supplement our ownership rules, such as requiring more independently produced programs and enforcing real public interest performance standards on our stations, we come perilously close to taking the "public" out of the public airwaves.

Don't tell me that those of us who feel strongly about this are being too emotional or are laying too much on one set of decisions. Some would have us believe that this is merely an ordinary examination of our rules that we conduct every two years. Let's not kid ourselves. This is the granddaddy of all reviews. It sets the direction for how the next review will get done and for how the media will look for many years to come. As for the emotion, I have seen the concern, the deep feeling and outright alarm on the faces of people who have come out to talk to Commissioner Adelstein and me all across this broad land. Are they emotional? You bet. And I think they are going to stay that way until we get this right.

I. THE COMMISSION'S DECISION-MAKING PROCESS AND RECORD DEVELOPMENT WAS DEEPLY FLAWED.

Good, sustainable rules are the result of an open administrative process and a serious attempt to gather all the relevant facts. Bad rules and legal vulnerability result from an opaque regulatory process and inadequate data. Unfortunately, today's rules fall into the latter camp.

The Commission launched this biennial review proceeding in September 2002. I went into this last year believing that if the Commission really worked at it, got around the country looking

at various markets, talking to people, collecting data and really reaching out, we had a shot at building an adequate record for today's vote.

Unfortunately, we have not succeeded. I am concerned that this proceeding has been run as a classic inside-the-Beltway process with too little outreach from the Commission and too little opportunity for public participation in this far-reaching review of critical media concentration protections. This is the way the Commission usually does business, we are told. Well, I submit this is too important to be treated on a business-as-usual basis.

Let's look at the facts. In October, we released the results of a dozen FCC-sponsored studies. We gave commenters a mere 60 days to analyze the six separate media consolidation rules and to sift through the twelve studies. A number of these studies are incomplete and contested, criticized because of allegedly faulty methodologies and unwarranted conclusions. Yet today's item returns to them again and again, according them what I believe is more deference than merited, to the exclusion of other expert studies. I criticize the studies no more than the Commission's operating premise that in this far-reaching rulemaking that will affect tens of billions of dollars in industry business, we could understand its implications and its consequences through a small number of meagerly financed inquiries that ignored many of the most critical questions.

I was also saddened last Fall that we failed to open our own studies to public scrutiny by not releasing the methodology or underlying data, notwithstanding that some of the studies were based on proprietary data that parties criticized as being created for and manipulated by the media industry. Finally, a month later, while the clock for comments continued to run, we provided limited release of the underlying data, but only to those who could come to our headquarters in Washington, D.C. Requests for further extensions of time to assess these studies and provide additional record data were denied.

We then sought to promote the broader national dialogue and debate that these issues so clearly merit. Proceeding on an assumption that all expertise does not reside within the Beltway, I sought to have the Commission hold a series of forums and roundtables around the country that would include significant input from both traditional and non-traditional stakeholders. After an initial flat denial we were given only one official hearing, and it was less than 100 miles outside the Beltway in Richmond, Virginia.

That was a start, but at the time we held that hearing, a survey indicated that three-quarters of all Americans were not aware that this critical issue was being decided at the FCC. We had not told them, nor had Big Media told them. I sought additional hearings and forums. Again, no success. I sought resources to hold my own hearings and to attend forums. Again, requests for both staff assistance and funding were denied.

Using my limited office resources, I have traveled across the country to attend as many hearings and forums as I could. I commend Commissioner Adelstein for his very active participation in this hearing process. Between us, we have held hearings and attended forums in New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta. All told, there have been over a dozen gatherings to discuss media ownership.

With resources and institutional dedication, a full-fledged process involving more Commissioners could have given us the information and insight needed to craft rules that both took account of technological and market changes and fulfilled our responsibility to protect localism, diversity and competition. But we had too few resources and too little dedication. So, we are left, unsurprisingly, without the record or new ideas we need to do our job well.

More recently, the Commission has even refused to publicly disclose the rules we are voting on today. What possible harm come from transparency? How can telling Congress and the public what we plan to do possibly be bad? I see no legitimate purpose for casting our votes in a shroud of secrecy except to insulate the FCC from public scrutiny.

Therefore, Commissioner Adelstein and I sought to have the specific proposals put out for public notice and comment. We believed that the country would be much better served by putting the proposals out for comment for a limited period, say 60 or 90 days, so we could get it right, understand the consequences of the new rules (both the intended consequences and those invariably more troubling unintended ones) and let these ideas bathe in the sunshine of national debate. Such discussion would have the important additional benefit of enhancing the sustainability of any Commission decision in court by providing concrete input, analysis, and testing on specific proposals. Sound policymaking, perhaps even the law, requires no less. But the request was denied.

When a draft proposal, ***not including the proposed text of the new rules themselves***, was circulated to Commissioners a mere three weeks before today's vote, we formally requested that the Commission postpone today's meeting to provide additional time to study more thoroughly the impact of the proposals and their interplay, and to see if common ground could be found. Under long-standing Commission practices, such requests from Commissioners have generally been honored. That request was also denied.

And so, we arrive at today. Citizens across this country will hear for the first time the proposals that we are adopting. Some of the details of the rule changes have leaked to the press. Even with this incomplete information, the public reaction against the proposed changes has been unlike anything the FCC has ever experienced. This proceeding has generated three-quarters of a million comments now – more than any other proceeding that I

am aware of in the history of the FCC. Of those comments, all but a few hundred are from individual citizens. And of those, nearly every one opposes increased media consolidation – over 99.9 percent!

We've heard bipartisan concern from more than 150 Members of Congress, including the Congressional Black Caucus, Congressional Hispanic Caucus, and the Congressional Asian Pacific American Caucus, asking us to slow down and put these proposals out for public comment before we vote. Some of those Members of Congress are here today.

Dozens of organizations have weighed in with their concerns about media concentration. Among others, we have heard from Children Now, the Writers Guild of America, the Parents Television Council, the Communications Workers of America, AFTRA, the National Association of Hispanic Journalists, the National Association of Black Journalists, the Conference of Catholic Bishops, the Center for the Creative Community, Common Cause, the American Civil Liberties Union, the National Rifle Association, the American Civil Liberties Union, the National Organization for Women, the Family Research Council, the National Association of Black Owned Broadcasters, Rainbow Push, the Media Access Project, Consumers Union, the Consumer Federation of America, Move On, the Center for Digital Democracy, United Church of Christ, the Minority and Media Telecommunications Council, the Leadership Conference on Civil Rights, and many, many more across a broad political and geographic spectrum. City councils across this country in such places as Chicago, Seattle, Philadelphia, San Francisco, Atlanta, and Buffalo, as well as a whole state -- Vermont -- have gone on record against media concentration. Note, please, that several of these are cities where Big Media would have us believe that all is well with the consolidation they have introduced.

As Brent Bozell of the Parents Television Council so aptly put it, "When all of us are united on an issue, then one of two

things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept." Well, it's the concept – a transcending, nationwide concept. This issue is not Republican or Democratic. It is not liberal or conservative. Not North or South. Not young or old. It is an all-American issue.

The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails "for" and the letters, cards and e-mails "against" and awarding the victory to the side that tips the scale. But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the right call is to take these proposals, put them out for comment and then -- only then -- call the vote. Plausible arguments have been put forward that the letter of the Administrative Procedure Act requires this. Other legal experts demur. I do know this: the spirit underlying notice and comment is that important proposed changes need to be seen and vetted before they are voted. Today we vote before we vet.

Now the only opportunity all these concerned citizens have to comment on the specific rules is to file reconsideration petitions after the decision is already made. Given that such petitions are unlikely to be resolved for months, the impact of this decision by then will likely be irreversible. In such a situation, we ought to establish a longer timetable and procedure for implementation of these changes to the rules, just as the Commission did when it dismantled the financial interest and syndication rules a decade ago. Such a procedure would allow the Commission to consider petitions for reconsideration on these specific rules to protect against irreversible, unintended and unforeseen negative consequences. This would also allow the Commission to examine its proposed rules and determine if additional measures are needed to protect the

public interest before consolidation occurs, and it would allow Congress opportunity for any input that it may deem appropriate.

II. THE RECORD DOES NOT SUPPORT THE MAJORITY'S DECISION TO UNDERMINE MEDIA CONCENTRATION PROTECTIONS.

In reviewing our first biennial review, the D.C. Circuit faulted the Commission for its failure to provide an adequate explanation for its rules.[3] Importantly, the court did not indicate that a relaxation of the concentration limits is warranted or required.[4] On the contrary, the Commission could choose, if so inclined, to ***tighten*** its ownership rules. What the court demands is that the Commission provide more analysis and empirical data to justify the rules it adopts. And I do not believe the courts want only granular, data-driven justifications; I think they would welcome justifications more deeply grounded in history, macroeconomics, political theory and the philosophy of democratic government. In any event, we are obligated to present reasoned rationales with more compelling explanations than we have thus far presented. But we are ***not*** instructed to radically restructure the rules.

My overarching reaction to the record before us is this: first, the evidence we have gathered does not justify such loosening of the rules as the majority approves today and, secondly, we have not asked a sufficiently diverse range of questions to do justice to so important a public issue. The evidence we have amassed points to the need for maintaining existing media concentration protections.

The court was particularly troubled by inconsistencies in our previous decisions. Yet, in this Order, the majority once again

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[3] *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-45 (2002), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

[4] *Sinclair*, 284 F.3d at 162.

fails to provide coherence and internal consistency to the rules and rationales we adopt. I am concerned that these inconsistencies will undermine the decision on appeal and will open the decision to the charge that it was made to reach the result sought by companies that want to consolidate. I provide below a few examples of these inconsistencies.

A. The Majority Ignores the Lessons of Radio Concentration.

In 1996 Congress and the FCC eliminated the national cap for radio concentration. Over the years the Commission has loosened its local radio concentration rules so that one corporation can now own up to eight stations in a market. These deregulatory changes provide the FCC with a record to study the impact of fewer media concentration protections on localism, diversity and competition.

The largest company owned less than 75 stations before deregulation. Today one company, Clear Channel, owns more than 1,200 stations. This company owns eight stations in many cities, and in some towns owns virtually all the stations available. The number of radio station owners has decreased by an incredible 34 percent since 1996. The number of minority owners has dropped by a shocking, and nationally embarrassing, 14 percent. A Future of Music Coalition study shows that music has become more homogenous and that many stations are now programmed by computers hundreds of miles away rather than by local DJs, leaving no local content. In our hearings around the country, Commissioner Adelstein and I have talked to many capable young musicians and creative artists who are simply unable to secure air time in the new consolidated radio environment. Real news radio is dying outside the largest cities, and viewpoint diversity has given way to a constant drumbeat of one-sided talk shows.

Even supporters of today's decision have been heard to say that the state of radio is troubling – yet the Commission charges ahead to deregulate TV and newspapers without

comprehensively studying the results of radio concentration. The failure to do so ignores critical information that is both relevant to these rules and that suggests the rules we vote on today are a mistake.

Even worse, although the majority claims it is taking steps to limit radio concentration, in fact the majority today launches a new round of consolidation in radio. First, the majority eliminates the radio/TV cross-ownership rule which limited the number of commercial radio and television stations one company could own in a market. Without these cross-ownership limits, companies can expand their reach even further. In addition, in the name of helping small businesses, minorities, and women, the majority creates a huge new loophole for consolidation above even the limits set today. The majority grandfathers any clusters that are above the caps. It further allows a company to transfer those licenses to a small business. After only three years, the majority allows the small business to sell those stations to anyone else without restriction -- even if it is to Clear Channel or some other giant media conglomerate. This decision will encourage a regulatory shell game that threatens to make a mockery of the radio limits.

B. The Decision To Raise the National Ownership Cap to 45 Percent is Arbitrary.

Current protections limit TV networks to controlling 35 percent of the national TV audience. Today we increase this limit to 45 percent, encouraging what Merrill Lynch calls a "Gold Rush" of acquisitions of local stations by the big four networks. The Communications Act insists that the Commission protect localism, diversity and competition. In reviewing the last biennial review, the D.C. Circuit held that diversity and localism are valid public interest goals and that the Commission could determine that the national ownership cap is necessary in the public interest if it serves either interest. The court held, however, that the Commission had failed to

provide sufficient evidence that either objective was served.[5] The majority today correctly determines that a national cap is needed to serve the statutory goal of having independently owned affiliates continue to serve local community needs and to act as a counter-balance to the national networks. The majority, however, arbitrarily determines that the cap should be raised from 35 percent to 45 percent without adequately justifying this new number, seeking comment on this specific number, or presenting their rationale for arriving at it. The courts may exact a heavy toll on the majority for these omissions.

The National Association of Broadcasters, the Network Affiliated Stations Alliance, and other parties favoring retention of the 35 percent cap submitted exhaustive and largely uncontested evidence including economic studies, station surveys, in-depth analyses, and numerous market-specific examples to justify retention of the 35 percent cap. The record evidence demonstrates, among other things, that independently owned affiliates are better able to preempt network programming networks based on community standards and needs; that the 35 percent cap ensures a critical mass of affiliates necessary to perform this role effectively; and that a substantial majority of affiliates are experiencing increasing pressure from the networks not to preempt network programming. Yet, the majority largely ignores this evidence and arbitrarily chooses a number that tips the balance further in favor of the national networks and away from the local stations. The majority fails to explain how a 45 percent cap – in reality a 90 percent national cap with the illogical UHF discount as discussed below – meets Congressional goals.

The majority justifies an increase in the cap to 45 percent based on the assertion that affiliates preempted networks with a national reach of over 35 percent as often as those with less

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[5] *Fox*, 280 F.3d at 1042-43.

than 35 percent. It does so without accounting for the weight of evidence in the record that supports retaining the 35 percent cap. The majority further reasons that the 45 percent cap could accommodate all existing combinations. But this goal could have been met with a 40 percent cap as well. Yet the majority concludes that it needs to allow conglomerates to grow further without any explanation for this particular number. I repeat: the prospects for successful judicial scrutiny are not well served by this approach.

Some have argued that the only way to preserve free over-the-air television is to let the big conglomerates get even bigger. Unless we allow even more concentration, the argument posits, over-the-air television is doomed. I find the arguments regarding the networks' financial distress to be far-fetched, more likely totally ludicrous. The facts tell such a different story. The networks, with their ability to deliver a large number of viewers across the country, have become even more valuable. They not only reach consumers over the air through their own highly profitable stations and through affiliates, but they are also guaranteed carriage to cable subscribers. Indeed, they own much of cable. The record demonstrates that the top four networks maintain the greatest reach of any medium of mass communications. I find no convincing evidence in the record of network poverty or financial distress. Although it is difficult to break out a precise measure of one part of these large conglomerates' operations, it is clear that their broadcast operations are profitable. Moreover, the network operations enhance the profitability of other parts of the conglomerate. The Commission itself recently concluded that, "Broadcast television is certainly a survivor, even a vigorous survivor."[6] The networks command an enormous advertising premium.

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[6] Jonathan Levy, Marcelino Ford-Livene and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, Federal Communications Commission, Office of Plans and Policy Working Paper 37, 309 (Sept. 2002).

They recently received a record $9.4 billion in up-front prime-time advertising for the next season. They have ownership in most of their profitable programs, and these are subsequently put into syndication or "repurposed" – the fancy new term for a re-run. These companies know how to move costs around, shift assets and make things look good or bad as they need to do for various audiences. Sometimes regulators hear a very different story than Wall Street analysts hear. I believe the argument that the only way for the less well-off among our citizens to continue receiving free, over-the-air television is through allowing already powerful networks to grow more powerful would have been better left unsaid.

I would add a point on the much-touted economies of scale and the alleged efficiencies of bigness, because it may be that the networks do have a longer-term reason to worry. This country has witnessed the unraveling of huge mega mergers and acquisitions across economic sectors during the past couple of years, while other such ventures are struggling to make it. We should have learned by now that size is no guarantor of success, even though the urge to grow larger continues to motivate so many industries. Suppose we whittle down the media world to an even more precious few, and some of these begin to implode like other huge deals have imploded. Talk about stations going dark! Talk about striking at the heart of the country! Sometimes I think the networks need to be protected from themselves.

C. Maintaining the 50 Percent UHF Discount In the Face of Technological and Marketplace Changes Is Arbitrary.

Understanding the so-called "UHF Discount" is critical to understanding how the new 45 percent cap will actually work. Under the UHF Discount policy, UHF stations are considered to reach only 50 percent of the households that a VHF station reaches in a market for purposes of determining whether a company has exceeded the national ownership cap. When established in the mid-1980's, this discount was designed to

take into account the technical limitations of over-the-air UHF stations. The Commission found that over-the-air UHF stations reached fewer viewers than VHF stations because their signals were different and weaker. But UHF and VHF stations reach an identical number of viewers when delivered over cable TV facilities. The differences between UHF and VHF only manifest themselves when they are broadcast over the air. Why didn't the Commission consider this in the 1980's? Because at that time cable penetration was only around 35 percent, so the vast majority of Americans received their television signals over the air. Today over 85 percent of consumers receive their signals from cable and DBS. Cable signal carriage rules ensure that consumers receive the UHF signal, and DBS operators are required to carry all UHF stations in any market where they carry any local channel. According to the record, these changes in the market are reflected in the valuations of UHF licenses which are approximately 10-15 percent less than VHF licenses with similar affiliations. Indeed, the Commission itself in previous proceedings has recognized that the growth of Multichannel Video Programming Distributor (MVPD) subscribership has reduced the UHF signal handicap.[7]

With 85 percent of Americans experiencing no difference between UHF and VHF stations, the discount no longer makes sense. Eliminating the entire discount may be warranted, but at a minimum it requires replacement with a number that reflects the reality of today's technology and marketplace.

Notwithstanding the majority's repeated admonishments that the Commission must take into account changes in the marketplace and in technology and must provide empirical data for the rules it adopts, the majority inexplicably, and I believe wrongly, retains the UHF discount in its present form without performing the comprehensive review that is required.

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[7] *See, e.g.*, Review of the Prime Time Access Rules, 60 Fed. Reg. 44773 n.101 (1995).

Adding to the inconsistency in this decision, when the majority conducts its analysis of the cross-ownership and local television rules, it counts the number of television stations in the market. All stations – whether UHF or VHF -- are counted equally in this analysis and assumed to be available throughout the market. How can it be that, in one part of the decision, UHF stations are determined to reach the entire market, and in another part of the same decision, those stations are determined to reach only half the households?

Eliminating or changing rule after rule to allow further consolidation on the basis of changed technology and market conditions yet refusing to change the one rule that the networks approve will lead many to believe that this decision is results-oriented, that it is designed to ensure that no station group exceeds the national cap, and that conglomerates may continue to grow no matter what technological or marketplace changes may occur.

III. THE MAJORITY'S RULES AND REASONING ARE ARBITRARY AND INCONSISTENT.

As described above, I believe that the majority has made serious errors in its high-level decisions to restructure media concentration protections. It is also important to recognize that when one digs into the details of today's action, it becomes clear that it is riddled with arbitrary decisions and inconsistencies. I describe a few of them here.

A. The Majority Protects Against Mergers of the Top Four Television Stations in a Market but Inconsistently Allows a Monopoly Newspaper To Purchase Even the Top Television Station.

In the local television ownership rule, the majority recognizes that a single entity can achieve excessive market power through consolidation. The majority therefore precludes one company from owning two of the top four television stations in a market. The majority further treats news sources

as interchangeable in its "Diversity Index" that counts different media news outlets available to consumers. Yet, although the majority constrains two of the larger local news voices in the market from combining in the local television rule, the majority arbitrarily provides no similar constraints in its cross-ownership rules. The Order allows a newspaper – clearly a significant news voice in the market – to purchase one of the top four television stations, thereby potentially harming consumer welfare and eliminating a voice just as surely as allowing two of the top four stations to merge. The majority does not explain this inconsistency. Nor does it explain how allowing a newspaper with say 80, 90, or even more of the circulation in a community to merge with the top station in that market would help a smaller newspaper or television station survive. Indeed, such a merger could allow the creation of a dominant news outlet in the market against which no other entity could compete. Yet, the majority does not explain how eliminating one strong local news voice through consolidation will benefit diversity, localism or competition in that market.

An additional problem concerns the majority's method of counting news voices in the market. The Diversity Index counts television, newspapers, radio, and the Internet as local news outlets. It weighs television most heavily, and gives Internet sites the least weight, based on where consumers ***actually*** obtain their news. The majority, however, then counts all outlets within a medium equally in assessing the level of consolidation allowed. This inconsistency between using actual news sources in one part of the Diversity Index and potential news sources in another leads the majority to count a television shopping channel as heavily as a station with local news programming when assessing news outlets within a community. In sum, the majority bases its Diversity Index on where consumers supposedly obtain news, but then arbitrarily allows cross-ownership based on all television stations, not just those providing news.

B. The Majority Inconsistently Accepts "Highly Concentrated" Markets and Arbitrarily Treats All Television Stations as Equals.

In its local television ownership rule, the majority allows one entity to own three stations when there are at least 18 stations in the market. The majority reasons that requiring 18 stations will preserve at least six independent voices and therefore, ensure the market is at most moderately concentrated. The *Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission categorize any market with fewer than the equivalent of 10 equal-sized independent entities as "concentrated," and any market with fewer than 6 such entities as "highly concentrated."[8]

But the new rules go even farther, permitting even more concentration by allowing duopolies in markets with as few as five stations. Thus, broadcast television in many markets across the country may be highly concentrated. Moreover, given that all stations do not provide local news, the market for broadcast television newscasts will be even more highly concentrated. The majority does not take account of this fact.

Why does the majority believe that allowing concentrated local markets is acceptable? Why does it believe that allowing even highly concentrated markets is acceptable in markets with 5 to 6 stations? Why does it treat all TV stations as equals, from the Home Shopping Network to the local NBC station, whether or not they have local news?

A similar problem of concentration occurs in the context of the local radio rule. At present, we not only limit the overall number of stations one entity can own, but we also flag mergers that will result in one or two entities dominating a market, thereby initiating a public interest review by the Commission. The majority would have the Commission rely only on a station limit, without any examination of the audience or advertising

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[8] Horizontal Merger Guidelines, 57 Fed Reg. 41552 (1992).

share. Without such limits, one company could acquire all of the top stations in the market, with the result being that one entity dominates, or even monopolizes, that market.

C. The Majority Arbitrarily Fails To Account for Local Market Conditions in its Bright-Line Rules Undermining Localism, Diversity and Competition.

The record demonstrates that every local newspaper market is "highly concentrated" according to the Department of Justice's Hirfindahl-Hirschman Index. Indeed, most communities have become one newspaper towns. The vast majority of local television and radio markets are tight oligopolies, with even higher levels of concentration for local news. I do not find that the majority accounts for this extreme level of concentration in its decision, ignoring quantifiable data in the process.

A rulemaking that met our statutory obligation to safeguard localism, diversity and competition would have examined the voices available in specific local markets and whether proposed transactions would undermine these principles in specific communities. The majority's reliance on national bright line rules does not allow us adequately to take into account different situations in local markets. The majority inconsistently allows parties to seek waivers of our rules where local conditions mean a transaction that violates the bright line rules would in fact not offend localism, diversity and competition; but it does not similarly accept petitions to deny transactions that undermine these core principles even if they meet our bright line rules. This one way ratchet is arbitrary and irrational.

D. The Majority Arbitrarily Concludes that All Consolidation Will Enhance News and Informational Programming.

The majority arbitrarily concludes as a general nationwide matter that efficiencies created through consolidation will enhance news and informational programming. They therefore,

a priori, determine that all mergers that cause concentration levels up to our bright line rules will serve the public interest, without any individualized examination of the facts of a particular merger. There is no record to support such a sweeping conclusion. The majority, without such support, bases its rules on the hope that companies will use some of the money they save through consolidation to invest in more news and informational programming. But the record shows that instances where companies have provided more news and informational programming following consolidation are overwhelmed by instances where news voices and news programming in a market were eliminated.

E. The Majority Arbitrarily Treats Television Stations, Newspapers, Radio Stations and Internet Sites Equally For Purposes of Analyzing Diversity and Competition in the Local Market.

The majority treats broadcasters as just one voice among many, no different from a website. The majority's analysis depends upon treating different types of media as equally important "voices" in the local market. Clearly, different types of media are not identical in providing localism, competition and diversity. This analysis ignores that broadcasters play a distinct role in our media. They are granted the right to use a public resource and, in exchange, they commit to serve their local communities. Notwithstanding the majority's assertions about new technologies and the availability of alternative sources of information, the fact remains that there is still an inadequate number of frequencies to accommodate all those who wish to broadcast to local communities.

We should recognize and reaffirm the proud heritage of local broadcasters, many of whom are strongly committed to serving the public interest. Unfortunately, consolidation has meant that broadcasters are less and less captains of their own fate and more and more captives to Wall Street and Madison Avenue expectations. One large station owner reportedly stated that,

"We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products." Another large station group's "local" news is actually "distance cast" from one central location hundreds of miles away. During the hearings and forums that Commissioner Adelstein and I attended, we heard time and again from small, local broadcasters that consolidation has had a direct and detrimental impact on their ability to compete against the large conglomerates that cut costs by consolidating operations outside of the community. Although there are few such poignant examples, it is not only such places as Minot, North Dakota that are feeling the effects.

F. The Majority Arbitrarily Subordinates Diversity and Localism Concerns To Competitive Concerns.

The majority subordinates the statutory goals of localism and diversity to competition throughout its analysis. The principles of localism and diversity are deeply rooted in our history. Since the earliest days of our nation, access to a diversity of viewpoints on issues of public importance has been considered essential to democracy. Maximizing the number of independent owners increases the likelihood of a wider range of viewpoints. And Congress mandated that we protect localism because local media tailor their programming to the needs of their communities.

Yet, the majority time and again relies only on measures of economic efficiency to justify rule changes, but does so at the expense of viewpoint and ownership diversity. It is clear that it would be less expensive to have one owner control all of the news outlets and to have the local broadcaster merely act as a passive feed for a national network. But the American broadcast system is based on more than just market forces. Any rule changes must be evaluated in diversity and localism terms, and not just economic terms.

I am pleased that the majority at least acknowledges the important goal of having adequate minority and female ownership in the broadcast industry. But I am disappointed that it then fails to take well-considered action to try to achieve this goal. Minority ownership is vitally germane to this proceeding. I fail to see how we can perpetuate diversity of viewpoint, for example, without addressing minority ownership. Ownership matters to diversity. The issue of its impact on women and minorities should not be relegated to a Further Notice at some indeterminate time. It is not enough to allow dominant clusters that exceed our limits to be transferred to small businesses and then, after a few years, be transferred to a large media conglomerate. How does it benefit minorities and women to maintain such high levels of concentration in a market? How will minority- and female-owned businesses break into a market if the stations are already locked up? Wouldn't these businesses be better served if there were more opportunities for ownership and we addressed such problems as access to capital?

Other facets of diversity fare even less well. The majority concludes that market forces will ensure adequate program diversity, and it dismisses outlet diversity and source diversity as independent goals. There is inadequate record support for these sweeping decisions. Lacking record support, the majority merely offers us and unproven beliefs for comfort.

In the end, this decision also disserves competition. In a media world already well down the road toward high levels of consolidation, questions of preserving small, independent voices and of encouraging conditions conducive to new market entry should be a top Commission priority. Instead, I hear around the country, and I read in newspapers almost every day, the anguish of independent stations facing the prospect of imminent absorption by one of the media Goliaths. Some of these independents serve very diverse audiences and what they

fear most is that the first casualty of a buy-out would be their very diversity.

IV. THE ORDER FAILS TO CONSIDER SEVERAL RELEVANT CONCERNS AND TO INCLUDE SEVERAL IMPORTANT PROPOSALS.

The previous section describes a number of problems with the contents of the Order. But equally troubling are the Order's omissions. The Commission has not conducted adequate analysis to make an informed decision on the impact of the additional consolidation we allow today. The studies the Commission conducted are a start. But, even putting aside the myriad criticisms of the conclusions and methodology employed in these studies, the Commission only examined a few questions. Amazingly, we did not even attempt to consider the prospective impact of the consolidation that would occur following these rule changes. Nor have we ascertained how these rule changes interact and work in concert, instead apparently assuming that each rule is an island, and that the interactivity of rule changes will not have important effects on the media landscape. These studies also do not consider what the impact of these rule changes will be on local communities across this country.

This section details several relevant specific concerns that are not adequately addressed in the Order, and several important proposals that, if included in the Order, would have greatly improved it.

A. The Order Should Address the Impact of Undermining Concentration Protections on Independent Programmers.

Commenters addressed the need to require more independent programming on our airwaves so that a few conglomerates do not act anti-competitively to control all of the creative entertainment that we see. These proposals should have received the serious attention they deserve in ***this*** decision.

Over the past decade, we have witnessed a substantial increase in the amount of programming owned by the networks. Where once independent production accounted for much of what we saw, we now have huge vertically-integrated conglomerates that own the vast majority of the programming they deliver.

As we loosen the concentration limits, we should have addressed whether there is a need for independent programming requirements to ensure that we do not end up with national vertically-integrated conglomerates that control the distribution channels ***and*** all of the content we see and hear. The powers of vertical concentration in today's broadcast industry are part and parcel of the power that accompanies ownership. Network ownership of the full range of prime time programming constrains competition, consigns independent production to oblivion or, at best, minor and marginal roles, and it cripples the production of diverse programming. It also entails serious job losses for thousands of workers, including creative artists, technicians and many, many others. I am disappointed that the majority dismisses out of hand the issues raised by independent content producers. The majority expresses doubt that it had notice to act and then finds that changes to our rules are not warranted in any event.

B. The Order Should Establish a Legitimate License Renewal Process To Partially Protect Against the Risks of Further Consolidation.

Some commenters suggested the need for an effective license renewal process under which the Commission would once again actually consider the manner in which a station has served the public interest when it comes time to renew its license. The Commission formerly did exactly that. But the system has degenerated into one of basically post-card license renewal. Unless there is a major complaint pending against a station, its license is almost automatically renewed. A real, honest-to-goodness license renewal process, predicated on advancing the public interest, might do more for broadcasting

than all these our other rules put together. Such a process, properly designed, would avoid micro-management on a day-to-day basis in favor of a comprehensive look at how a station has discharged its public responsibilities over the term of its license. Such an approach is most certainly within the scope of this proceeding, if for no other reason than the objective of our ownership rules is to benefit the public interest. It would certainly be a welcome supplement to achieving the goals Congress established for the ownership caps.

C. The Order Should Require Licensees and Those Seeking License Transfers To Periodically Report To the Public How They Serve the Public Interest.

From the earliest days of broadcasting, the Commission has sought to promote localism and obligated licensees to serve the needs and interests of the local communities. Why not require licensees to disclose more publicly how they are serving the public interest and the needs of their local communities? Such information, perhaps made available on the Internet, would give the public an overview of how its airwaves are being used and might provide incentives to produce more and better local news and community programming. At a minimum, it would allow us to analyze whether our rules are actually achieving their desired goals so that future Commissions can make better decisions.

In addition, as discussed above, special disclosure rules ought to apply to buyers and sellers seeking to transfer a license. They ought to specify the tangible, concrete ways in which the transaction would serve the public interest. The merged entity would then have to disclose after the transaction how it fulfilled its public interest benefits. Such a step would allow the Commission to identify those transactions that serve the public interest, convenience, and necessity, as required by the statute. The majority claims that consolidation could lead Big Media to produce more and better local news and community programming. Let's take some action to make sure

this expectation is met and to hold conglomerates accountable after mergers. Moreover, this procedure would allow us to identify those transactions in all markets -- including smaller markets -- that serve the public interest.

D. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Children, On Families, and on Indecent Programming.

In our hearings, we heard from parents fed up with the rising tide of indecency and violence on the airwaves and repulsed by programming's race to the bottom. We also heard from broadcasters who had managed network-owned and operated stations and were unable to preempt programming that they believed was not suitable for their community. These broadcasters told us that programming decisions were often made by distant network executives rather than by local station managers. In contrast, we heard from independent local broadcasters who had stood up to programming they and their communities found inappropriate.

Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. Yet, the Commission failed to address this issue in its analysis. Has consolidation led to an increase in the amount of indecent programming? When programming decisions are made on Wall Street or Madison Avenue, rather than closer to the community, do indecency and excessive violence grow more pervasive? I do not know the answer to this question. I do know this: we have no business voting until we take a serious look at the matter and amass at least a credible body of evidence. We owe it to our children, and their parents, to explore this question before voting on whether to allow more consolidation.

I say again: ownership matters. If it is not germane for this proceeding to ascertain whether there is a possible relationship between indecent content and the fact that a shrinking Media Elite controls that content, then I do not know what is germane.

In addition to its failure to consider the impact of consolidation on indecency, the majority does not look at the relationship between concentration and ***positive*** children's programming. We now have some data on this subject in the record. The news unfortunately is not good. A recent study analyzed the market in Los Angeles and found that the number of broadcast TV programs for children dropped sharply after independent local stations were swallowed up in media mergers. This study found a 47 percent drop in children's programming with duopolies accounting for the largest decreases. Another recent survey found that 80 percent of parents think the FCC is doing a poor to fair job of protecting families and children. Unfortunately, we do not take actions today to gain their confidence. Although the Commission does take a positive step today to ensure that duopolies and triopolies will not merely rebroadcast the same children's programming, we do nothing to examine how Big Media will serve our youngest viewers and listeners before allowing further consolidation to take place.

Some believe that the First Amendment does not allow us to consider these subjects in relation to our concentration rules. But there are laws in force today on both of these subjects and courts have upheld special responsibilities for broadcasters related to these goals. If there is a question of whether the Commission can constitutionally try to use concentration restrictions to reduce indecency and increase children's programming, let us have that debate on the record rather than ignore these clear Congressional goals.

E. The Order Fails To Analyze the Impact of Undermining Concentration Protections on Women and Minority Groups.

Twenty-five years ago, in the FCC's Statement of Policy on Minority Ownership of Broadcast Facilities, the Commission said, "It is apparent that there is a dearth of minority ownership in the broadcast industry." A quarter of a century later, there

still is. Although today's Order recognizes the importance of minority and female participation, we fail to conduct rigorous analysis of the impact of today's rules on minorities and women.

We know that there are substantially fewer radio station owners today than there were before the rules were changed in 1996. People of color now make up less than four percent of radio and television owners. The National Association of Black Owned Broadcasters tells us that the number of minority owners of broadcast facilities has dropped by 14 percent since 1997. People of color are under-represented not only in boardrooms, but in newsrooms as well. Maybe that's why a study from Fairness and Accuracy in Reporting found that 92 percent of sources interviewed on the nightly network news were white and 85 percent were male. A handful of huge companies stand astride the media world and it is not helping diversity of viewpoint, diversity of ownership, or just plain old American diversity.

It is not surprising therefore that among those opposing the relaxation of ownership rules are the Congressional Black Caucus, the Congressional Hispanic Caucus, the Congressional Asian Pacific American Caucus, the Leadership Conference on Civil Rights, the National Organization for Women, the National Association of Black-Owned Broadcasters, the National Association of Hispanic Journalists, the National Association of Black Journalists, and many others who are afraid that additional media concentration will reduce opportunities for minorities and women.

We have not even attempted to understand what further consolidation means in terms of providing Hispanic Americans and African Americans and Asian-Pacific Americans and Native Americans and women and other groups the kinds of programs and access and viewpoint diversity and career opportunities and even advertising information about products and services that they need. America's strength is, after all, its

diversity. America will succeed in the Twenty-first century not in spite of our diversity, but ***because*** of our diversity. Diversity is not a problem to be overcome. It is our greatest strength. ***And our media need to reflect this diversity and to nourish it.*** It takes no rocket scientist to understand that changing the rules of media consolidation is likely to have far-reaching effects on different groups.

The decision today states that we will address minority and female ownership proposals in the future once we have established a new Advisory Committee on Diversity. An advisory committee is a good step, but we should not be deflected from tackling the ownership diversity questions that are central to the media concentration item before us now. I am reminded of that old bureaucratic sleight-of-hand of foisting controversial issues onto a new government commission or task force to get them out of the way. In any event, solutions to this problem will be harder to come by if media conglomerates proceed now to lock up control of the scarce licenses to use the public's airwaves. That is why these problems need solutions now, not somewhere far down future's road.

Where the Commission has acted in this decision, it is not to the benefit of minority communities. The majority even determines that those who speak Spanish or any language other than English do not deserve the limited protections the Commission adopts today. The cross-ownership rules apply only to English-language newspapers unless it can be demonstrated that another language is dominant in that market. Thus, these safeguards are not even triggered by a merger between a broadcaster and, for example, a Spanish-language newspaper in most communities in this country. This decision allows even higher levels of media concentration for the millions of Americans who depend on non-English media for their news and entertainment.

F. The Order Fails to Analyze the Impact of Consolidation on Small, Local Broadcasters.

Increasing consolidation threatens the very survival of small, local broadcasters. Media analysts expect that the only option for local broadcasters will now be to sell. They conclude that those that want to remain will face an extremely tough road. During our hearings, we heard from small broadcasters that had already been squeezed out of the market. These rule changes can only accelerate this trend. These changes could spell the end for such uniquely local stations as WCIU TV in Chicago and many other small, independent broadcasters. Yet, we have failed even to consider the impact on these local broadcasters.

G. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Small Businesses and Advertisers.

Changes to media concentration rules also threaten small businesses. As fewer and fewer companies control our media outlets, small local broadcasters will find it harder and harder to compete. Other small businesses will find it harder to produce and sell programming as national vertically integrated conglomerates control local distribution.

Concern has been expressed in the hearings that Commissioner Adelstein and I conducted that consolidated media markets are more expensive for advertisers. We have also heard concerns relative to consolidated media companies forcing advertisers to run ads in all their media assets and stations, not just the ones the advertisers really want. This means that even if per-eyeball ad rates look stable in a market, real-life advertising expenses may be rising significantly. And small businesses may not be able to afford advertising on multiple outlets, even if the rates in one particular market are not rising. This is another of those circumstances that need study before we proceed to vote.

Moreover, we have heard that consolidation may lead to homogenization and media geared to certain and limited demographics. Already, we have seen a reduction in children's programming due to consolidation. This means that advertisers

who want to reach minority groups or niche communities may be stuck without a way to access them.

Small businesses have been, and will continue to be, the engine of growth in our country. Yet we fail here to analyze how media consolidation will affect small businesses. The Office of Advocacy of the Small Business Administration strongly urged the Commission to conduct such an analysis prior to rushing ahead with a decision.

V. CONCLUSION.

I began this proceeding hopeful that we would take a balanced, measured approach, engage in fact-finding and open discussion, and reach out to stakeholders across this land. Instead, in the face of (1) a record that simply does not support the changes being proposed, (2) a record that fails to do justice to the larger implications of these issues, (3) overwhelming public opposition, (4) widespread and bipartisan concern about both the substance and the process that have been followed here and (5) the potential for great and irreversible consolidation before we fully understand the consequences of our actions, I am convinced this is the wrong decision. It is wrong for the media industry, wrong for the public interest, and wrong for America.

All this means that I am deeply saddened by the Commission's actions today. Some have characterized the fight against this seemingly pre-ordained decision as quixotic and destined to defeat. But I think, instead, that we'll look back at this 3 vote as a pyrrhic victory.

This Commission's drive to loosen the rules and its reluctance to share its proposals with the people before we voted awoke a sleeping giant. American citizens are standing up in never-before-seen numbers to reclaim their airwaves and to call on those who are entrusted to use them to serve the public interest. In these times when many issues divide us, groups from right to left, Republicans and Democrats,

concerned parents and creative artists, religious leaders, civil rights activists, and labor organizations have united to fight together on this issue. Senators and Congressmen from both parties and from all parts of the Country have called on the Commission to reconsider. The media concentration debate will never be the same. This Commission faces a far more informed and involved citizenry. The obscurity of this issue that many have relied upon in the past, where only a few dozen inside-the-Beltway lobbyists understood this issue, is gone forever.

I believe, after traveling the length and breadth of this country, that our citizens want, deserve, and are demanding a renewed discussion of how their airwaves are being used and how to ensure they are serving the public interest. I urge my colleagues to heed the call. I want to thank the hundreds of thousands of people who have attended hearings, filed comments, written letters to the editor, and contacted the Commission. You have made a difference. And if you stay the course now, we have a chance to settle this issue of who will control our media and for what purposes, and to resolve it in favor of public airwaves of, by and for the people of this great country.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN DISSENTING

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

This is a sad day for me, and I think for the country. I'm afraid a dark storm cloud is now looming over the future of the American media. This is the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

The public stands little to gain and everything to lose by slashing the protections that have served them for decades. This plan is likely to damage the media landscape for generations to come. It threatens to degrade civil discourse and the quality of our society's intellectual, cultural and political life. I dissent, finding today's Order poor public policy, indefensible under the law, and inimical to the public interest and the health of our democracy.

In the end, this Order simply makes it easier for existing media giants to gobble up more outlets and fortify their already massive market power. It capitulates to many of the longstanding demands of the media companies we oversee.

This approach shatters most of the last vestiges of the consumer protections that weren't eliminated in the 1980's. This decision pulls the teeth out of the remaining rules, leaving the FCC a toothless tiger. As big media companies get bigger, they're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator. If this is the toaster with pictures, soon only Wonder Bread will pop out.

It may take a while for the public to feel the full effects of today's decision. Consolidation in the media markets could take place over a number of years, just as it did in radio. But people will notice every time a new merger goes through that eliminates a voice in a community. Their anger will flash as they surf through their channels only to find more sensationalism, commercialism, crassness, violence, homogenization and noticeably less serious coverage of news and local events, just as many Americans warned me they expected to happen if we allowed further consolidation.

It didn't have to turn out this way. Congress and the courts forced a massive review. They did not force massive deregulation. We had a choice. The courts required us to justify our rules, not to gut them or replace them with pale substitutes. Certainly, the media markets have changed, and our rules must keep pace. But the majority chose to go much further than Congress or the courts required. They chose to pursue gratuitous deregulation. This is by far the most dramatic weakening of our media ownership rules this country has ever seen.

This has turned out to be a painful process. I had hoped for a better outcome I could support, or at least oppose less strenuously. The Commission undertook the most comprehensi e review of its rules ever. It was designed as an effort to produce a judicially-sustainable, intellectually-coherent framework. But those good intentions and good faith efforts didn't pan out. The comprehensive framework never materialized. An effort begun with serious intellectual aspirations descended into an incoherent, outcome-driven political document, the likes of which the Commission has too often seen and sought to avoid.

A new regime for a new era never materialized. Instead, we're left with a muddled patchwork of meager protections. The only consistent elements are market-driven philosophies and deregulatory outcomes. The Order is rife with references

to market efficiencies but virtually devoid of references to consumers or citizens.

It's been difficult for me to watch a group of colleagues whom I genuinely respect, like and admire move in a direction with which I so strongly disagree. I feel compelled to speak out, but take no joy in taking such strong exception.

The majority implies that Congress and the courts forced this outcome. I disagree. We had much wider latitude than this suggests. The biennial review provides a simple directive – to determine whether the rules "are necessary in the public interest as the result of competition," repealing or modifying them only if we deem them "no longer in the public interest."

The linchpin of Congress's statutory guidance is two words – public interest. The American citizenry should benefit from each decision. All American citizens must benefit, including minorities, women, and non-English speaking citizens.

In the context of media ownership, no matter what others think the Circuit Court may have implied, the FCC still has a special duty to protect what the Supreme Court referred to as an "uninhibited marketplace of ideas."

I'm afraid this decision departs dramatically from our statutory mandate, which is to establish rules in the "public interest, convenience, and necessity." Let me explain why today I think we fail to meet even that flexible, broad standard.

Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals, and virtually everyone in between. We have received about three-quarters of a million comments from the public in opposition to relaxing our ownership rules, a new record, and only a handful in support. Of the hundreds of citizens I heard from directly at field hearings across the country, not one stood up to call for relaxing the rules. Of the thousands of e-mails I personally received, I saw only one didn't oppose allowing further media concentration.

The American people appear united in believing that media concentration has gone too far already and should go no further.

I've heard it said we can't make this decision by polls or by weighing postcards. Fair enough.

But the statute doesn't let us simply dismiss the public's views with a passing reference in one paragraph, as this item currently does. The public apparently has no interest in further media concentration. Does the majority really know what's better for the public than the three quarters of a million citizens who are motivated enough to contact the Commission or attend field hearings? We should not assume that those people who took the time to alert us to their deep-seated concerns, with 99.9 percent in opposition, are wrong unless there is overwhelming evidence proving it. Here, just the opposite is true. There is plenty of evidence the people are right.

The public is joined by bipartisan chorus of caution from over 150 Members of Congress. Organizations from nearly every political stripe, from the National Rifle Association to the National Organization for Women, expressed grave doubt about the wisdom of allowing greater consolidation. We heard from artists, academics, media moguls -- Republicans, and Democrats.

It has been said that the public comments we received are too simple and offer no substantive basis from which to make our decision. I beg to differ. I have read a lot of their comments, and I've listened to hundreds of people firsthand in city halls, schools churches and meeting rooms.

Let me tell you, the Americans we heard from know what they're talking about. This is the media they view every day. They take it very personally, and they are very articulate and substantive in what they say.

We have heard from people who have collectively spent billions of hours watching TV, listening to the radio and

reading newspapers. There is no better expert witness than the American people. There is no more objective jury.

But today's decision overrides their better judgment. It instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest. Those who stand to benefit by buying and selling the public airwaves won out over the public.

Anyone who questions whether consolidation can cause harm need only look to the experience of radio. The most constant refrain I heard from coast to coast was complaints about the homogenization and loss of news coverage on the radio dial since 1996. People begged us not to let happen to television what happened to radio. But the majority did not heed this concern. By ignoring this history, we may be destined to repeat it. Radio is a very sick canary in the coal mine, and we're about to infect television with the same disease.

I suggested and would have taken another approach. This Order often equates the public interest with the economic interests of media conglomerates. It assumes that efficiencies and cost savings created by mergers will translate into benefits for the public. But it makes no effort to ensure that will actually happen.

We could have easily addressed these concerns. I share the view that given changes in the marketplace, some of these combinations may make sense. I could have supported greater flexibility to evaluate mergers on a case-by-case, market-by-market analysis. That is the only true way to determine if media mergers of this magnitude would actually benefit the public. But the only way to determine the value of a given merger is for the Commission to request companies that seek to merge to demonstrate how, in the case of those particular entities in those particular markets, any efficiencies gained by the merger would be channeled into something positive for the viewing public.

The majority rejected such an approach in favor of bright line rules. They refused even to ask parties that seek to merge to say anything about how many news staff would be retained, the number of hours of local programming planned, cross-programming plans for TV duopolies or the overall impact on news and public affairs programming.

Their stated goal is to achieve more market certainty for entities that seek to merge. They proudly note that establishing set rules facilitates transactions, reduces costs and makes deals more attractive to the capital markets. Another stated goal is to avoid the administrative burden that a case-by-case approach would impose upon the Commission.

The Order actually makes a special effort to proclaim the Commission has no interest in the facts of particular cases since the new rules are the be-all and end-all of what's in the public interest. This implies the Order divined some sort of higher truth as to what works best in every case for the American people. It says we don't want to be bothered with facts that might point in another direction.

In its rigid insistence on fixed rules based on oftentimes arbitrary numbers, the Order ignores our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the public airwaves. And it favors the Commission's administrative "convenience" ahead of the public interest. We are here to carry out the statute, not subvert it with the excuse that it's too much work to implement. This just won't do when our very democracy is at stake.

The majority's approach simply assumes that if we let media companies merge, they will channel the resulting efficiencies into better programming for the public. Broadcasters have a long and proud tradition of public service I know many will want to carry on. But in the absence of some other compulsion, the logic of marketplace competition and the media companies' fiduciary responsibility to shareholders will require them to

maximize profits rather than serve the public interest. The record does not support the dangerous assumption that the many mergers contemplated under these rules will invariably serve the public interest.

One argument in favor of unleashing the media giants is that free over-the-air television is threatened. That's a worthy goal, but the rumors of its demise, widely spread, are greatly exaggerated.

In reality, just last month, broadcast network advertisers spent a record $9.4 billion in upfront sales for next season, up 13 percent. The Wall Street Journal recently reported that some networks make $600-$700 million, though others are less profitable.

It is quite telling that the best case for consolidation is that the networks need to make still more. It's not the FCC's job to make sure every big TV network makes money – that's up to network management. Our first priority is ensuring the American people get a wide range of diverse viewpoints.

The day we will know over-the-air TV is in real trouble is when broadcasters start lining up to turn back their licenses. Today, instead, the value of television stations continues to skyrocket because these licenses are so scarce. One station in Los Angeles sold for $800 million. Why are the networks so interested in increasing the nationwide cap or acquiring triopolies or duopolies in local markets if this business is on the way down?

It violates every tenet of a free democratic society to let a handful of powerful companies control our media. The public has a right to be informed by a diversity of viewpoints so they can make up their own minds. Without a diverse, independent media, citizen access to information crumbles, along with political and social participation. For the sake of our democracy, we should encourage the widest possible dissemination of free expression through the public airwaves.

Some argue that the concern about the threat to American democracy is overblown since it is so strong and resilient. While our democracy is strong and not about to crumble, does it mean we can afford to weaken it? Doesn't it matter that only half our citizens vote? The same people argue there is plenty of diversity already, so we can afford to lose some. I just don't agree.

Despite the Order's assumption that technological advancements render broadcasters just another voice in a crowd of ever-expanding and fungible media channels, a simple fact remains. No technological advances have made it possible for every person who wants to broadcast in a local community to do so. Nobody yet has figured out how to replicate the spectrum for everyone who wants to broadcast a message. The exclusive right to use the broadcasting spectrum denies it to all others.

The majority completely ignores the reality that neither cable nor the Internet has changed the huge market power granted by federal license to use scarce broadcast spectrum, particularly when that license comes with the requirement to be carried on cable.

It also ignores that people still get the vast bulk of their local news and information from the same places they always have: their local newspaper and local TV stations. And these are the very outlets we are giving the most new flexibility to merge.

Today's bottom line spells an open season on consolidation. In place of our once powerful cross-media limits, only 2.3 percent of the American population will now receive full diversity protection. In contrast, the markets where all remaining cross-media protections have been entirely lifted represent 72.58 percent of the population.

While I agree that some consolidation may be warranted in the very top markets, the leap from protecting 100 percent of the population with full cross-newspaper/broadcast protections

to less than 3 percent is dramatic. We are moving to a world where in larger markets one owner can combine the cable system, three television stations, eight radio stations, the dominant newspaper, and the leading Internet provider, not to mention cable networks, magazine publishers and programming studios which could produce the vast bulk of the programming available to those outlets. In my view, it is no exaggeration to say the rules now permit the emergence of a 21st Century Citizen Kane on the local level, with perhaps a handful of Citizen Kanes on the national level.

In smaller markets, say the town of Great Falls, Montana with a population of 56,690, under our new rules one entity could own the cable company, the dominant television station, the dominant newspaper, and multiple radio stations. Is this safe for democracy?

We have heard that relaxing the rules is appropriate because so many Americans can now access so many channels, the Internet and other media. But it turns out the same few vertically-integrated global media firms own the bulk of what people see. Ownership has become more concentrated. A person can always add more electrical outlets throughout their home, but that doesn't mean they will get their electricity from new sources. The same goes for media outlets.

And we cannot ignore that many citizens have no access to these wonderful new options. Until every American can effectively access these outlets, this Commission should protect the diversity available in the outlets that serve their needs.

Our task, therefore, should be to encourage maximum diversity, not assure a four-voice or six-voice sliver of it. This Order, to the contrary, concludes that there is plenty of diversity already, so we can afford to sacrifice some and have enough left over.

The public interest means more than just efficiencies and cost savings. Every community has local needs, local elections,

local news, local talent, and local culture. While localism reflects a commitment to local news and public affairs programming, it also means much more. It means providing opportunities for local self-expression and reaching out to, developing and promoting local talent. It means making programming decisions to serve local needs. It means allocating resources to address the needs of the community. Localism's many virtues are hard to capture, but may get easier to ignore as companies consolidate.

When this full document is finally made public, I expect it will be torn apart by media experts, academics, consumer groups, activists, and most of all, the American people. They will find it riddled with contradictions, inconsistencies, false assumptions and outcome-driven thinking.

I would like to recount some of the most glaring inconsistencies and flawed reasoning behind these new rules. I've got a much longer written critique I will release soon, but will spare you now by summarizing some highlights.

In perhaps the Order's most inexplicable inconsistency, the Majority decides to retain a 50 percent discount for UHF stations in the national television cap, yet fails to apply comparable treatment to the local television rule and cross-media limits. To discount some stations for one rule while failing to do so in others is arbitrary and unjustifiable. If the purpose of this exercise is to update our rules in light of technological developments, we can't ignore some just because we don't like the outcome of more stringent limits.

In perhaps the most blatant evidence of a results-driven process, the Majority goes out of its way to allow companies to seek waivers of the new bright line rules to achieve greater concentration, while it attempts to deny the statutory right of opponents of mergers to petition to deny a given transaction. It is fundamentally unfair to allow waivers for corporate interests in extenuating circumstances without the corresponding protections to the public.

The Diversity Index was a noble effort that tragically degenerated into an ill-conceived rote formula that even Merlin couldn't decipher. The index is seemingly nothing more than economic jujitsu, an ornate castle built upon a foundation of sand at the ocean's edge.

After detailing at length the new formula and its underpinnings, the Majority stresses that the index is used only as a basis to draw bright-line rules. But the order specifically denies any person the right to apply this new magical formula to a particular market. In other words, no one can use the FCC's own new methodology to show that an application in a particular market harms the public interest.

Among its many flaws, the index distorts how it calculates the market shares of relevant providers in each local market, resulting in grossly understated measurements of the impact of any particular combination. For example in New York, it treats the Shop At Home TV station the same as the local NBC station. Similarly, with respect to newspapers, the index treats the New York Times the same as the Polish Daily News.

Despite the quest for empirical footing, the index is premised on admittedly incomplete data. Recognizing that the Nielsen study failed to ask the specific question of the source of local news, the majority marches ahead, cobbling its own data points on local news sources from selective answers to muddled questions.

Against all notions of consistency, the majority unwisely decides that even if a broadcaster is restricted from acquiring a newspaper, the broadcaster can still buy the paper and hold it until its next renewal period – a period of 8 years. This simply underscores the outcome-driven nature of this Order.

On the radio front, the retention of some local radio rules appears an acknowledgment by the majority that they couldn't stomach the fallout from the rapid consolidation of the past

seven years. And some actual improvements were made in the market definitions.

Yet, for all the talk about tightening the radio rules, in several important respects the Order actually further unleashes the industry. It eliminates the radio-TV cross ownership rule. And it eliminates the current limit on the audience or advertising share any one owner can gain through mergers in a local market. For a rule designed solely to address competitive effects of mergers, it is mystifying why the majority would cast aside such a fundamental and economically sound principle as accounting for the measure of power of combined stations. The revised rule now clears the way for mergers that previously were denied or designated for hearing due to the strong likelihood of negative competitive effects.

The Order includes a helpful provision that allows only small businesses --initially -- to buy grandfathered groups of radio clusters that no longer comply with the new market definition. While useful, it may not get used much. Small businesses will encounter great difficulty in raising the capital necessary to buy expensive, large clusters, if they ever even come on the market at all. This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spin-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool.

In my view, adding an admittedly helpful provision that potentially affects a only a handful of stations, if it ever gets used at all, doesn't come close to offsetting the sad truth that small businesses, including those owned by minorities and women, are going to find it even harder in more concentrated and expensive media markets to raise capital, own outlets or have their unique voices heard.

Most alarming is that after only three years, the small business can flip the grandfathered cluster to any large radio or media conglomerate like Clear Channel. Making this approach

so ripe for abuse further diminishes the likelihood that it will serve much of a useful purpose, since real disadvantaged businesses will have to bid against companies that plan to sell to well-capitalized radio giants, raising the price of clusters. The ultimate beneficiaries of this approach could be companies like Clear Channel that could add even more grandfathered clusters than it currently controls.

Today the Commission introduces a new behemoth into our media landscape: a TV triopoly. Where is the empirical evidence supporting this creation in our record? As unjustified by evidence as it may be, this leap is in only nine of top TV markets.

More troubling is the leap in the number of duopolies now permitted. Duopolies are now restricted to sizable markets. But this Order expands duopolies to 162 out of 210 markets, or 95.4 percent of the population. I can't fathom why we would allow such dramatic consolidation across the board with no analysis as to how this will impact individual markets. It's a breathtaking assumption that each of these mergers, all of which will eliminate a local voice, is in the public interest. And I don't believe the record justifies it.

I do believe the record demonstrates that further concentration of power in the hands of networks justifies retention of the national network cap at the 35 percent level set by Congress.

The majority has not adequately justified the selection of a new 45 percent cap. It relies exclusively on evidence showing that the largest network station owners possess no greater bargaining power, measured by prime time preemptions, than the smallest network station. This is a thin reed on which to justify a 10-point increase. Moreover, without access to more data, this conclusion is unconvincing.

In the end, we have yet another tradeoff between efficiencies and public interest goals such as localism. Guess who wins.

The social benefit of locally originated and oriented programming and program selection to me outweighs the efficiencies of further vertical integration.

Finally, let me explain why I cannot join the majority in voting for retention of the dual network rule. I disagree with the Order's conclusion that diversity no longer underpins this rule. But more importantly, a more rigorous examination of this rule must be conducted in light of the rising tide of Spanish-language broadcasting networks. Just as the rule is retained for the top-four English-language networks, so too should Spanish broadcasting be examined separately. The rapid growth of the Spanish language media in the past several years is having a significant effect on the landscape in which broadcast networks operate. I believe that these developments require us to consider whether to afford Spanish-speakers the same protections available to English-speaking television audiences.

Looking back on how we got here, I am convinced there is little else I could have done to change the outcome. In an effort to moderate the extreme proposals that emerged, I offered suggestions to my colleagues which unfortunately were not incorporated. The turning point when I realized I could not likely support this proposal was when a majority settled on the notion that bright line rules were preferable to making market-by-market determinations as to whether mergers served the public interest.

The Supreme Court has said that "promoting the widespread dissemination of information from a multiplicity of sources" is of the highest order. So safeguarding diversity should not be subject to abstract diversity scenarios or arbitrary decisions that reduce the number of voices people can hear.

I don't mean to suggest that bigness is always bad, or that free enterprise will always fail the public. There is some truth to the arguments that my colleagues make today. There's nothing inherently wrong with earning profits from using public property.

But when it comes to gaining even greater profits at the expense of the cornerstones of our democracy, we must carefully question the effect on the public. Today's rules just don't let the big get bigger, they will effectively prevent smaller entities from breaking in. I would have relaxed the rules more incrementally and shown the public each time how it would benefit.

Since my arrival here 5 months ago, I have approached this proceeding with a constructive frame of mind. I sought to understand the various proposals and their underpinnings, and offer my views on their efficacy. Even after others closed in on an approach with which I could not get comfortable, I made reasonable attempts to moderate the proposals -- which were refused. In the end, it wasn't the process that precluded me from participating in drafting and supporting today's Order. It was the substantive direction the item took and the results-driven imposition of bottom line, bright line rules ahead of all else. I am disappointed that a majority of my colleagues could not be persuaded to take a more reasoned, conservative, case-by-case approach.

This is far from over. Congress may prove more responsive to the citizens who passionately plea for the independence and diversity of their media. To paraphrase Winston Churchill, this is not the end, or even the beginning of the end, but just the end of the beginning.